(1709)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

ANIMAL LEGAL DEFENSE FUND, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, AND AMY MEYER,

PLAINTIFFS,

V.

GARY R. HERBERT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF UTAH; SEAN D. REYES, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF UTAH,

DEFENDANTS.

CASE NO. 2:13-CV-679

SALT LAKE CITY, UTAH
OCTOBER 25, 2016

CROSS-MOTIONS FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE ROBERT J. SHELBY
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

UNIVERSITY OF DENVER STURM COLLEGE OF LAW
BY: JUSTIN F. MARCEAU, ESQ.
2255 E. EVANS AVENUE
DENVER, COLORADO 80208
(617) 256-9073

ANIMAL LEGAL DEFENSE FUND
BY: MATTHEW LIEBMAN, ESQ.
170 EAST COTATI AVENUE
COTATI, CALIFORNIA 94931
(707) 795-2533

LAW OFFICE OF MATTHEW STRUGAR
BY: MATTHEW D. STRUGAR, ESQ.
2154 W. SUNSET BLVD.
LOS ANGELES, CALIFORNIA 90026
(323) 696-2299.

BY: STEWART W. GOLLAN, ESQ.
584 WALL STREET
SALT LAKE CITY, UTAH 84103
(801) 413-3406

FOR THE DEFENDANTS:

UTAH ATTORNEY GENERAL'S OFFICE
BY: KYLE J. KAISER, ESQ.
DARIN B. GOFF, ESQ.
160 EAST 300 SOUTH, 6TH FLOOR
PO BOX 140856
SALT LAKE CITY, UTAH 84114-0856

COURT REPORTER:

RAYMOND P. FENLON
351 SOUTH WEST TEMPLE, #7.430
SALT LAKE CITY, UTAH 84101
(801) 809-4634

P-R-O-C-E-E-D-I-N-G-S

(1:38 PM)

THE COURT: Good afternoon, everyone. We'll call case number 2:13-CV-679. This is The animal Legal Defense Fund, et al. versus Governor Herbert, et al.

Counsel, I have your names. Many of you are familiar to me. Why don't we take a moment and make our appearances, please.

MR. LIEBMAN: Good afternoon, Your Honor. Matthew Liebman of the Animal Legal Defense Fund on behalf of the plaintiffs.

MR. GOLLAN: Stewart Gollan on behalf of the plaintiffs, Your Honor. And I apologize, I will need to step out for a portion of today's hearing. I've been unfortunately double-booked in State Court, but I will not be making any argument so I shouldn't be --

THE COURT: I've heard of State Court.

MR. GOLLAN: Yes.

THE COURT: Is that near here?

MR. GOLLAN: It is very near here.

MR. KAISER: Good afternoon, Your Honor. Kyle Kaiser and Darin Goff from the Utah Attorney General's Office representing Governor Herbert and Attorney General Reyes.

THE COURT: Thank you. All right. Well, welcome to all of you. This is the time set for hearing on your

cross-motions for summary judgment. I would estimate that about 95 percent of the time when I come to the bench we begin a hearing like this with a preliminary ruling. Having reviewed your briefs, ordinarily I have formulated some initial view at least of how the issues might turn out and why, and I usually try to explain that at the outset in hopes that it will narrow the focus of our argument.

There are a lot of issues. There is an awful lot of paper. There are a lot of questions in my mind. I have not even attempted today to formulate a preliminary opinion in advance of coming to the bench, nor am I certain that I could have. I mean there are really a lot of things I'm very interested to learn from all of you today.

I thought about ways to structure this argument to make it most efficient, and most of those failed also in my mind. So we'll go as we go, I think maybe issue by issue, and maybe hear from each side as we step through things.

And let me just say at the outset, there were a number of amicus briefs that were filed. There's been an awful lot to read. And while I appreciated the amicus briefing and all of you had the benefit of reviewing that also, my anticipation is we'll hear today from the parties only. So we'll narrow our discussion in that respect.

I'd like to start I think with what may seem -- maybe it's the most obvious place to start. Are there First

Amendment interests implicated by this statute? Why don't we start there, and maybe why don't we start with the plaintiffs.

Mr. Liebman, will that be you?

MR. LIEBMAN: Yes, Your Honor.

THE COURT: If you'd come to the podium, please. In a lot of the briefing, as you're coming up and getting situated, and in some of the amicus briefing as well, there are sort of two divisions that a lot of folks draw here. One is the misrepresentation right that may be implicated, and one is the recording right, if there is one. Alvarez may tell us something about the representation or misrepresentation element. And we don't have a lot of clear guidance that I can see, none that is binding on me about recording. And why don't we start there. Is recording -- does recording give rise to a First Amendment interest?

MR. LIEBMAN: It does, Your Honor.

THE COURT: It depends, doesn't it?

MR. LIEBMAN: Well, photography and videography are simply more high tech, high fidelity forms of drawing a picture or taking notes in a note pad. And recording is both inherently expressive, like drawing a picture, but also a form of conduct that is protected as preparatory to speech.

And the Court in Idaho District Court in the Otter case following the Seventh Circuit in ACLU versus Alvarez noted that just as the First Amendment protects the process of

writing down words on paper or painting a picture, the act of audiovisual recording is a form of purely expressive activity that's entitled to full First Amendment protection.

THE COURT: Let me invite you just to lift that microphone a little bit so our court reporter can hear you clearly as you're speaking.

MR. LIEBMAN: If I can add another case to that, the Rideout case. That's the First Circuit ballot selfie case. There's a similar case out of Indiana, the Indiana Civil Liberties Union versus Indiana Secretary of State, which also prohibited taking photographs of one's ballot. And in both of those cases the courts took as a given that photography was a form of expression, and taking a picture of your ballot was within the ambit of the First Amendment.

But even if the Court doesn't accept that the act of taking a photograph is inherently expressive, it's at least a form of conduct that is preparatory to speech. And the Supreme Court in the Citizens United case makes clear that restraints on speech can operate anywhere in the chain of the production process. And if you stop speech in early stages or eliminate the ability to create speech in the first place, that restraint has to be analyzed under -- under the First Amendment.

THE COURT: Well, but if there's a restraint on an ability to record, that doesn't necessarily -- it may impair

speech, but it doesn't prohibit speech, does it? I mean you can still write about what you've seen. You can still speak about it. You just might not have all the different media available to you that you might want as a speaker. Are you entitled to any media that you wish to utilize to convey your speech about important ideas?

MR. LIEBMAN: Well, restraints on any form of speech have to be analyzed under the First Amendment. So those restraints would still have to be subject to a content neutrality analysis and either strict scrutiny or intermediate scrutiny as the case may be. And so, you know, a law that said no one can write with pencils would leave open the opportunity to write with pens, but it's still a restraint on speech, and if somebody prefers to write in pencil, that's certainly within their rights under the First Amendment.

So the First Amendment doesn't sort of only apply where there's an absolute prohibition on the oppor-- ability to communicate. If we take for example the McCullen case, this is the Supreme Court case where there are the buffer zones around abortion clinics in Massachusetts. And it was certainly the case that those individuals were able to communicate in other ways. They could take out advertisements in the paper, they could put up blogs, they could post on Facebook. But the fact that that buffer zone restrained their ability to do a form of speech that was crucial to their

counseling, that is approaching individuals and having one-on-one conversations with them, was enough to invalidate that statute.

And the same applies here. It's not the case that the First Amendment has a -- an ample alternative channels inquiry unless we get to intermediate scrutiny and we're dealing with a content-neutral statute that's already narrowly tailored to a significant government interest. And in strict scrutiny there's no alternative channel inquiry at all.

THE COURT: Well, we're just going one step at a time. We'll get there when we get there. I think you've just told me what I read in your briefs about recording as a First Amendment right or implicating First Amendment rights. Anything you wish to add beyond what you've said on that point?

MR. LIEBMAN: Well, on the recording point, the only point I would add is that recording, as we explained in our brief, and as the Court described in the Otter case, is a uniquely persuasive form of speech and restraints on it should be closely scrutinized. It's the only form of speech that is in a sense self-validating, self-authenticating, and as the Court read in Otter, it can vindicate an undercover investigator or a whistleblower who is otherwise not believed.

So on the question of protected videography, I think the Otter case, the Rideout case and the ACLU versus Alvarez case

established that it is a form of speech that at least has to be subjected to scrutiny under the First Amendment.

THE COURT: What about at different times in the papers referring to subpart (a) of the statute, some people refer to as bugging devices, is that First Amendment material, leaving a recording device somewhere or planting one where you're not present and just leaving it there?

MR. LIEBMAN: I think it is. It's still a form of recording. And if we accept the idea that recording is analogous to, you know, high fidelity notebook, then it's still protected. The analysis of whether or not it survives First Amendment scrutiny might be somewhat different, the privacy interests might be different, but for the threshold question of whether it's within the ambit of the First Amendment, it's still a restraint on recording and a content-based one at that.

THE COURT: Does it depend on the purpose or intent of the person who placed the recording device?

MR. LIEBMAN: I don't think it does. I mean the countervailing interests might be more significant, especially here where we're talking about recording a matter of public concern in a facility that already has a reduced expectation of privacy. And so, you know, the narrower version is that at least where we're talking about creation of speech that -- that is on the utmost political questions, in places where

there's not a privacy expectation, at least that ought to be protected.

And the balance might strike out differently if someone were trying to record intimate details in the home for example, but I think as a threshold it's certainly a question of -- it's certainly within the ambit of the First Amendment.

THE COURT: And if Samsung places a recording device at a conference room in an Apple facility, that's First Amendment speech --

MR. LIEBMAN: Well --

THE COURT: -- in addition to corporate espionage? Is it protected in some way?

MR. LIEBMAN: I think that the -- there we would be dealing, you know, if it's a -- a violation of, for example, a corporate espionage statute, we're looking at a law of general applicability and those get intermediate scrutiny under O'Brien.

THE COURT: But is that act of placing a recording device in my competitor's conference room, is that a protected First Amendment right that I'm exercising?

MR. LIEBMAN: It's not a protected right. So if the question is it at the threshold within the ambit of the First Amendment, you know, there's two ways of looking at it. One is that because it's not on a matter of significant public

concern, and it's not -- you know, a boardroom would have some expectation of privacy, then that might fall outside of the First Amendment altogether.

The other way of looking at it is that it's still speech and so falls within the protections of the First Amendment, but it might not be protected once you get to the actual First Amendment analysis because the privacy concerns outweigh the -- whatever interest the individual has. And if Samsung is bugging Apple, that sort of financial motive is drastically different than here where the purpose of these investigations is to expose food safety violations and animal cruelty that affect billions of animals and hundreds of millions of consumers.

THE COURT: And if a neighbor just has a prurient interest about what's happening next door and comes over one day when they're invited in for brunch and they just leave a recording device in their neighbor's house, they're exercising a First Amendment right are they?

MR. LIEBMAN: Well, its the same question. And certainly the Supreme Court has hot been clear about what it is that passes the threshold inquiry of whether it's speech or whether it simply fails under the application of the scrutiny. But I think in that case, you know, the home is different. The Supreme Court has said repeatedly in Fourth Amendment cases, in privacy cases, that the home is different and

certainly prurient interest is going to be different from sort of the public service interest that these investigations entail.

And so whether that's a threshold question or an application of the test question, I think the Supreme Court hasn't given great guidance on it, although it has said there's a very limited set of categories of speech that are excluded. Those are things like obscenity and fighting words and defamation.

And it has never said that invasions of privacy are per se outside of the ambit of the First Amendment. So if it doesn't fall in one of those categories, it probably is within the ambit of the First Amendment. But just because it's within the ambit of the First Amendment doesn't mean it survives the applicable level of scrutiny.

And so I would say that the corporate espionage example and the neighbor bugging their -- their neighbor's house would probably, if it doesn't fail at the outset of whether it's protected speech at all, would at least fail once we're applying the relevant interests. In this case the balance strikes out differently than in the espionage or the prurient neighbor example.

THE COURT: So I'm not a policy-making court. I'm just a lowly trial court, as I often say, just trying to apply the rules as best I understand them and as given to me by the

courts above. But what sense does that make to say that we're exercising a protected First Amendment speech right to just receive information, to record it, or to hear it -- for example, to place a bug and listen to audio conversations that happen at a workplace? How does that make -- what part about that is expressive in a First Amendment sort of way?

MR. LIEBMAN: Well, I mean expression doesn't have to go to other parties. I mean if I'm taking notes in a private journal, that's a form of expressive communication. And so, you know, the idea is if this recording is speech, then it's -- it's speech wherever it takes place. You know, the Supreme Court hasn't directly addressed the recording issues, but as it's been addressed by the Seventh Circuit in ACLU versus Alvarez, the Glik versus Cunniffe case, I believe it's the First Circuit, courts do seem to agree that recording, that is the receipt of information or the creation of information, is a form of speech that's protected by the First Amendment. And there's no principled reason to draw a distinction between it taking place in public versus it taking place in private, unless there's a countervailing privacy interest, which doesn't exist here.

The COURT: And it may be that in today's climate we're all journalists. Everyone with an iPhone is a journalist I suppose in some respect. But is the intent of the person recording the image or the sound not relevant? For

example, it seems to me that the argument is stronger here for the plaintiffs insofar as they maintain the very purpose for recording an image or a sound is to utilize that in advancing speech about an issue of importance to the plaintiffs, and it's bound up in the whole concept of the speech that they wish to make about the subject matter.

MR. LIEBMAN: I think that's right. And the Supreme Court has said that political speech occupies the highest rung of First Amendment protection. Certainly we can get into more marginal cases, and those might fall lower on the First Amendment spectrum. But typically the court has been pretty bullish in protecting free speech. Someone who, you know, creates a nonsensical poem, like the Jabberwocky for example, is still entitled to protection under the First Amendment, even if it's nonsensical, if it doesn't mean anything.

And so I think what the Supreme Court has been -- how they've been analyzing these questions is to typically assume that something is speech, and then unless it falls into one of those exempted categories, which it has guarded fairly jealously, has been loath to create new categories of speech that are totally outside of the First Amendment. In Alvarez it says false statements are protected. In Stevens it says that videos of animal cruelty are protected. And so without a clear category that's exempt, if it's speech, it's speech.

Now, again, the analysis of whether it survives

constitutional scrutiny might be different depending on the circumstances, but typically the motive for speech doesn't really address whether or not it is speech. And let me give Your Honor another example of that, the recent case from the Supreme Court. Heffernan is the name of it. This is the case where a police officer was seen carrying yard signs that opposed the mayor. The mayor saw this and fired him, but it turns out that he actually didn't support this other candidate, didn't have any interest in who won. He was picking up some signs for his mom.

And so the Third Circuit said, well, you weren't expressing yourself. This wasn't expressive conduct or speech and so there's no First Amendment violation. The Supreme Court reversed and said it really sort of doesn't matter whether or not the speaker had one motive or the other or any motive, even intended to speak. What we're trying to protect against is a governmental motive to silence speech. And because the termination of this officer was based on the government's perception that this person was engaging in speech activity, that was enough for his termination to be declared unconstitutional under the First Amendment, even though he wasn't even speaking.

So that's been in some cases referred to as a negative version of the First Amendment, that it's not just worried about the motive of the speaker but also sort of stopping the

government's intent to silence, stopping the government's motivation to crack down on speech. And here, you know, I'm sure we'll get into the legislative history which makes it quite clear that that was the intention of the statute.

THE COURT: Let's turn to section (b) then for a moment. And I think people have referred to this at times as the misrepresentation interest that's implicated here, obtaining access to an agricultural operation under false pretenses, the idea being I think that false pretenses are a protected form of speech. But is this provision in the statute drawn to the representation or the fact of access?

MR. LIEBMAN: Well, I think it's the fact of access. It's the false pretenses. You know, someone could say, you know, I've always wanted to work for Tyson Foods, and if it's true, they might get the job, if it's false, they don't. So just as in Alvarez, we have a statute that targets falsity and nothing more.

And so the very same candidate that makes one statement could gain access, you know, without a problem and the other person would be gaining access by false pretenses. So I think what's relevant is the false pretenses portion of that rather than the gaining access portion.

THE COURT: Well, except it's not a violation of the a statute to make a false pretense. Suppose I go and apply for a job at Tyson Foods and I misrepresent my employment

history, but then I'm never hired, and I'm not invited onto the facility, then the false pretense, that's an insufficient basis to give rise to liability under the statute.

MR. LIEBMAN: I think that's right, although I don't think Alvarez says that you can criminalize some subset of lies. I mean if there's a criminalization of misrepresentations, even if it's a subset and not all lies, that still demands analysis under the First Amendment and under Alvarez the strict scrutiny standard.

THE COURT: So if this is a component of subsection (b), then it's enough? It's both a misrepresentation and access, but because the misrepresentation is part of it, that's inherently an expression of speech so there's a First Amendment interest; is that right?

MR. LIEBMAN: I think that's right, yes, Your Honor.

THE COURT: All right. Anything more on subsection (b)?

MR. LIEBMAN: Well, I think it is important to note that the kinds of lies that we're talking about here are drastically different from the ones in Alvarez. I mean these are what have been referred to as truth facilitating lies. These are lies that actually further the First Amendment purpose of truth-seeking by opening up conversation on matters of significant concern.

And so, you know, in Alvarez we have someone who is telling a lie to elude the respect that had evaded him, as the Court put it. And that kind of low value lie, if that's protected, certainly a lie that actually enhances the fundamental purposes of the First Amendment ought to be protected as well.

And I do want to note that it's certainly true that the Alvarez court mentioned that false claims made to secure offers of employment might be unprotected, but I do -- I think it's important to locate that in context. And the context of that statement makes it clear that what the court is looking at is routine resume fraud, something like somebody embellishing their credentials to obtain a job that they're otherwise not qualified for.

And that's simply not what happens with undercover investigations. These are people omitting educational background or omitting their affiliation with an animal rights group, not sort of lying about their skill or experience. I mean certainly if someone lied about having a veterinary degree to obtain a position, that might be a very different case. But here the kinds of investigations we're talking about are sort of lies of omission or things that undersell their background.

And so that's not the kind of offer of employment that Justice Kennedy is talking about in that passage. He puts it

in the context of fraud or securing monies or other valuable considerations, all of which imply sort of something that happens at the expense of the recipient of the lie. But here the recipient isn't harmed in any way.

Just as in Food Lion, that's the Fourth Circuit case about the ABC investigators, the employer got what they hired for, which is someone who is going to perform the job, and that's what happens in these investigations.

THE COURT: Then an exposé on national television and everything that followed. I suspect that any company owner would take a very different view about whether there's any harm attendant to this kind of lie. I mean you're telling me one side of the lie or misrepresentation, that it's not harmful insofar as it doesn't inherently bring with it any -- I mean I actually wonder if you're -- I don't want to attribute this to you. I think you may have stated it more accurately than I'm about to. But it's one thing to look at the speaker and ask whether the misrepresentation provides some benefit to the speaker, and it seemed like in some sense that's what Justice Kennedy was talking about.

For example, you could imagine someone misrepresenting that they were a Medal of Honor winner for the purpose of obtaining some benefit that is attendant to that, a health benefit or an insurance benefit or something, or cash prize, none of which is real. I just made all that up. But that's

one thing, but it doesn't tell us anything about the effect of the misrepresentation on the party to whom you've made the misrepresentation.

MR. LIEBMAN: Yeah. I think the circuit courts have dealt with this in a number of cases where we have analogous undercover investigations or someone misrepresents who they are and then does an exposé, the Food Lion case from the Fourth Circuit, the Desnick case from the Seventh Circuit, and the Medical Labs case from the Ninth Circuit. In each of those cases we have an undercover investigator or journalist misrepresenting who they are and what they're there for, going in, doing the job or, you know, participating in a meeting and recording it and then putting out an exposé. In each of those cases the Court said that kind of conduct is -- it's not fraud, it's not trespass, it's not invasion of privacy, and it's otherwise not unlawful. So to say that there's some legally cognizable harm where the circuit court seems unanimous that these kind of undercover investigations don't cause a legally cognizable harm would be inconsistent.

And certainly, you know, these investigations at the end of day do cost money in terms of reputational harm and things like that, but these courts make clear that that kind of harm is attributable to the wrongful conduct and not to the misrepresentation. If the misrepresentation happened and they found nothing wrong, then there wouldn't have been an injury,

so it's not even a but for cause much less a proximate cause of the ultimate financial loss.

THE COURT: It's an essential precursor to the harm that follows. I mean in the instance where the misrepresentation is made for the purpose of obtaining employment, for the purpose of obtaining the video, for the purpose of releasing the video, for the purpose of causing economic injury, that all follows naturally in scope, does it not?

MR. LIEBMAN: It does, but there's an attenuation. There's an intervening cause, which is the misconduct that's being exposed. And certainly the courts in Food Lion, Desnick and Medical Labs all sort of deal with this question of whether or not the ultimate harm is attributable to the investigator or attributable to the person that did the misdeed, and they come out on the side of the investigators in holding that their investigation, their misrepresentation isn't the proximate cause of the financial injury that ultimately befalls the investigated entity.

THE COURT: And how did the employment -- excuse me -- the housing discrimination cases involving testers, in your view how does that fit into this analysis?

MR. LIEBMAN: Well, I think those cases support the same idea, that someone can go in pretending to be seeking housing when in fact they're going in to determine whether or

not there's racial discrimination. And to hold that mis -- the state can criminalize misrepresentations made to gain access would put in jeopardy the use of testers in the fight to combat housing discrimination.

And so to the extent that that -- you know, we could say that -- that a tester is the but for cause of, you know, housing discrimination lawsuit against the property owner, but I think we would recognize that it's the discrimination that's what we should be condemning rather than the tester for sussing out the discrimination, and the same applies in this case.

THE COURT: All right, thank you. Anything more on subsection (b) before we hear from the State?

MR. LIEBMAN: No, Your Honor.

THE COURT: Thank you.

Mr. Kaiser.

MR. KAISER: Yes, Your Honor.

THE COURT: So this is the First Amendment wearing a cape and boots and it has a big 1 on the chest I guess.

MR. KAISER: That's right. And I think the answer to your question is that there is no First Amendment protection for the types of conduct that are prohibited by the statute. And, you know, there's a lot of paper in this case, but I think the Court's opinion can be short because there is no protection under the First Amendment for these two types of

rights that the plaintiffs are asking the Court to create almost out of thin air. And because there is no First Amendment protection, then the First Amendment analysis can be short.

THE COURT: So is recording in other contexts a First Amendment right?

MR. KAISER: It's a very difficult question, Your Honor. Opposing counsel talked about recording as equating to a painting. Well, if someone writes something and there's no one there to see it or read it, is it really a communication? Maybe, maybe not.

THE COURT: Mr. Liebman says there need not be a communication for there to be a First Amendment right.

MR. KAISER: Well, and I think that's a pretty strong reading of the First Amendment which says Congress shall make no law respecting the establishment of religion, prohibiting the free exercise of religion, the abridging the freedom of speech. Speech includes conversation and communication. But even, Your Honor, even if there's some sort of First Amendment right to record, there is no case that says there's a right to record on private property.

THE COURT: Is there a case that says there's not?

MR. KAISER: Yes, absolutely, Your Honor.

THE COURT: Well --

MR. KAISER: I've got five for you. And the first

starts with Lloyd versus Tanner, 407 US 551. And I will admit these aren't recording cases, but these are even farther. These are exercising free speech rights, speech rights, on private property. And Lloyd versus Tanner is the first of the Supreme Court's mall cases.

THE COURT: Does it -- private property as a concept weaves throughout the briefing in this case --

MR. KAISER: Yes.

THE COURT: -- in an obtuse and amorphous way.

MR. KAISER: I apologize.

THE COURT: And I don't know that it's a fault, but don't we need to be precise when we're talking about private property? If we're talking about the location of the recording being outcome determinative about whether there's a First Amendment right, then don't we need to be precise? Is there a difference for example between recording in my neighbor's bedroom as opposed to recording in the open space in the public area of a Taco Bell?

MR. KAISER: Well, the Supreme Court on that has said no, there is no difference, because -- because private property rights extinguish your First Amendment rights. And we see that in five --

THE COURT: Private property rights extinguish First Amendment rights?

MR. KAISER: Perhaps that's an inarticulate way of

saying it. But let's look at these cases. Let's look at Lloyd v. Tanner. This was a mall, and a group of people wanted to handbill in the mall to protest the Vietnam war. Now, that's core political speech, and that's -- that's exercising not only your speech right but to assemble and to petition. I mean it's the core of the First Amendment. But this mall was a privately owned structure and the government -- and the mall had a prohibition on handbilling, leaf --

THE COURT: Are we about to talk about time, place and manner restrictions of speech?

MR. KAISER: No, Your Honor, absolutely not. Because in Lloyd v. Tanner and Hudgens versus NLRB the Court said the First Amendment doesn't apply. This isn't a time, place, manner restriction. This is the private property owner has a right to say no handbilling, and the First Amendment doesn't guarantee any rights in that private property, even core rights, even protesting. And in Hudgens v. NLRB the Court --

THE COURT: Well, protesting is different, is it?

MR. KAISER: Well, sure. It's more than the -- than what the plaintiffs are doing. It's more protected.

THE COURT: There's trespass as an issue for example.

MR. KAISER: Sure.

THE COURT: There's not a right to trespass onto property, private property, for the purpose of conducting your protest. For sure that's true. But is that different than if you're invited onto the property and you're engaged in otherwise First Amendment protected activity?

MR. KAISER: Well, I think that's -- I think that's a difficult answer. And I'm not sure that that replies to this statute because of all three parts of our statute which relates to recording, it's recording without the owner's consent.

THE COURT: So I really want to come back to recording for a moment. You're trying to steer me to other cases. I want to know is there a First Amendment right implicated by recording? Let's start with in public space a police officer interaction with a suspect in the street. Is there a First Amendment right in your view for a citizen to record that interaction?

MR. KAISER: I'm not sure, but the Seventh Circuit says -- has said yes. And there's good reason for the Seventh Circuit to say that. And I think when the ACLU made an as applied challenge to Illinois' wiretapping statute saying that they only planned to record in public, of public officials engaged in public duties, where -- where the conversation could be heard by normal means, and the Seventh Circuit said that's protected under the First Amendment. When the Illinois

State's Attorney said recording is never ever protected, that was -- that was Illinois' argument. I think there's some reason to at least give pause and say that might be a circumstance in which recording is part of the speech act in a public forum.

THE COURT: Do you agree with me that the state of the law on recording as a First Amendment right is that the Supreme Court has not recognized it or disclaimed it, the Tenth Circuit hasn't answered that question, and the only circuits to have addressed it have found that there is such a right in some circumstances?

MR. KAISER: On public property in public places, yes, I would concur with that.

THE COURT: So then we have a secondary question that arises maybe, and that is whether the -- whether that right that might otherwise exist in some circumstances is extinguished in others I suppose --

MR. KAISER: Right.

THE COURT: -- where it stops? And I think you urge that that right stops on private property I think you'd say without consent. Is that the line that you would draw? Is that the limiting principle?

MR. KAISER: I'm not sure if consent makes a difference. I know in this case we don't have consent. And I know in the five Supreme Court cases that talk about the right

to access information as pre-speech conduct there wasn't consent. So I don't know about consent, Your Honor. It doesn't make a difference in this case.

THE COURT: What are we to do with the police interaction with a suspect that takes place in a Taco Bell, in the public seating area of a Taco Bell? Does a patron have a First Amendment right to record that police officer interaction? They're on private property. It's owned by -- I can't remember the name of the entity now.

MR. KAISER: PepsiCo, or at least it was PepsiCo.

THE COURT: Or Yum Yum Foods.

MR. KAISER: Yum Brands.

The Court: Yum Brands. Is there a constitutional right implicated by a patron observing a police arrest in a Taco Bell and recording it?

MR. KAISER: No.

THE COURT: No First Amendment right?

MR. KAISER: No.

THE COURT: And your authority for that?

MR. KAISER: Is Lloyd and Hudgens and Branzburg, and a case that we didn't cite and we should have, Pell versus Procunier.

THE COURT: The last one, please.

MR. KAISER: Pell versus Procunier, 417 US 817. That's the -- that's the case where journalists wanted access

to -- to prisoners and contended that they had a First Amendment right to engage in that activity.

THE COURT: Well, I think I agree -- it seems to me that the case law is relatively clear on this point. The fact that you're a journalist or you hold yourself out as a journalist does not entitle you to special protections under the law, that is, it doesn't -- you're not entitled then to go to places that other citizens couldn't go.

MR. KAISER: Right.

THE COURT: You can't trespass onto the property in Wyoming for the purpose of extracting samples off of somebody's property.

MR. KAISER: Right, exactly.

THE COURT: But if you're an invited guest into the Taco Bell as a customer, you're prohibited from -- you've abandoned -- you have left your First Amendment protections at the door. Is that what you're saying?

MR. KAISER: Yes.

THE COURT: Okay.

MR. KAISER: I mean I think there's -- it's more complicated because I think there is an issue about consent that is not -- that is not addressed in our statute, but I think that the answer is yes. If -- if you're in private property, the First Amendment doesn't guarantee you those speech rights.

THE COURT: And the government --

MR. KAISER: Well --

THE COURT: The government, the government, can reach into that private property and remove your First Amendment rights or penalize you for exercising them, so that the government could pass a statute saying -- now it's the government under the First Amendment that should not abridge free speech.

MR. KAISER: That's right.

THE COURT: The government can say it is heretofore a misdemeanor to exercise your First Amendment rights in the public spaces of fast food restaurants. That's lawful?

MR. KAISER: Well, I think -- I think there's an interesting issue about consent that I have to be honest I haven't really thought about. But if you added the words without consent, without the consent of the owner, I think that that's absolutely right. Because it's no different than enforcing a trespass statute because you are exceeding your authority to be there. And if you don't have the authority to do what you're doing, then -- then, you know, that's the end of it.

THE COURT: Well, except that the trespass statute presents a different policy question, doesn't it, for not this court but for other courts and legislatures, and that is your -- your property interest, I think your ownership

interest, carries with it some right to exclude.

MR. KAISER: Yes, right.

THE COURT: So that's different I think.

MR. KAISER: I think it is different.

THE COURT: What about -- what about do whistleblowers enjoy First Amendment protection on private property or did they abandon their First Amendment rights also when they walked through the door?

MR. KAISER: Well, I haven't seen a case, Your Honor, that says in general First Amendment -- now, what we're talking about here is not the subsequent communication of whatever information that they received.

THE COURT: I'm just trying to determine if there exists a right.

MR. KAISER: And I think there's a big difference, right, because when we look at things like Food Lion the Fourth Circuit says publication damages are subject to the First Amendment. Bartnicki versus Vopper talks about the First Amendment right to distribute wiretapped conversations if you weren't part of the wiretapping. And that's -- when we talk about whistleblowers, we've got two sort of parts, right? We've got the -- we've got the whistleblower, the action of the investigation, and then we've got the subsequent distribution of information.

You know, right now in the Ninth Circuit the Ninth

Circuit is looking at the Center for Medical Progress. Those are the folks who went into Planned Parenthood and other abortion providers clinics and conferences and misrepresented who they were, got some people to say some things on video and then started releasing videos.

The District Court for the Northern District of California enjoined even the dissemination of further videos. And that's on appeal right now to the Ninth Circuit. Dean Chemerinsky, who wrote an amicus brief in opposition to us, wrote an amicus brief in support of the injunction in that case by saying that the Center for Medical Progress agreed when they went in the door to keep everything private, and this -- that contractual right is -- supercedes their First Amendment rights. There wasn't even a discussion of private property there, which I think is interesting, but that cut off the First -- any sort of First Amendment right.

And I think here we've got sort of the same thing. We've got --

THE COURT: You could contract -- is the idea there that I can contract to agree not to exercise my First Amendment rights in some instances?

MR. KAISER: That's the argument -- one of the arguments that's being made.

THE COURT: What sense does that make if my First Amendment right would be exercised in private property but

I've abandoned it at the door?

MR. KAISER: Well, because we're talking about the exercise -- we're talking about two different rights, right? In the Ninth Circuit case in the Center for Medical Progress case we're talking about the distribution of information gathered, and here we're still talking about information gathering and whether that is constitutionally protected in and of itself. But let's assume that it is, whether it's constitutionally protected on private property, it's not.

THE COURT: So is it your way of thinking that it's not a question about whether the recording might give rise to a First Amendment right that can lawfully be restrained, it's that -- on private property, it's just that there is no such right at all to free speech on private property? That's the State's position?

MR. KAISER: Well, let's -- rather than right to free speech, let's call it conduct preparatory to speech or speech activity. I'm not sure --

THE COURT: I really want to start -- I want to do this one step at a time. There's no reason to even get to preparatory speech if you don't have a right to free speech in the first instance.

MR. KAISER: Absolutely.

THE COURT: So the State's position is that the state of the law is that there is no First Amendment free

speech protection on private property?

MR. KAISER: That's right.

THE COURT: Okay. Well, then I don't think we need to explore conduct preparatory to speech --

MR. KAISER: Okay.

THE COURT: -- and the like. I think I understand the State's position about that. Why don't we then instead talk about false pretenses.

MR. KAISER: Sure.

THE COURT: Misrepresentation.

MR. KAISER: Absolutely.

THE COURT: How is that not pure speech? It's a statement -- now, you may distinguish from Alvarez, but isn't the statement made to gain admission to a property or gain access to a property? A statement, it's literal speech.

MR. KAISER: It's literal speech but it's not First Amendment speech.

THE COURT: I guess there could be two reasons. If I make the misrepresentation in the office, what you've said a moment ago is it can't be entitled to First Amendment protection anyway because I'm on private property. Is that true?

MR. KAISER: Yes.

THE COURT: Okay. But if I make the false statement elsewhere, it could be subject to First Amendment protection

but not in this instance?

MR. KAISER: Yes.

THE COURT: So why not in this instance?

MR. KAISER: Well, you know, I think Alvarez is a very interesting case. And I'm sorry that I'm not answering it -- your question directly, but if you can give me a little bit of leeway, I'll get to it.

THE COURT: I have a sense you're headed there.

MR. KAISER: Okay.

THE COURT: I'm with you.

MR. KAISER: You know, when I was taking First Amendment in law school a decade or so ago, we talked about threshold questions for the application of the First Amendment, and one was whether speech was true or false. And, you know, there was a pretty good consensus that false speech wasn't protected at all. And then we -- then comes the Stolen Valor Act which prohibits false speech with no context, right? It says it is a crime to claim that you won the Medal of Honor. And the Supreme Court says, well, we've said false speech is never protected or is outside the ambit of First Amendment, but we didn't mean that.

Now, Alvarez didn't say that false speech is protected. It just says that some types of -- that it -- it just says that false speech isn't protected merely because it's false.

THE COURT: I think I disagree with that, except

that you and I could talk about what it means. I think it's a four member plurality that made the statement. But in this point I think Justice Kennedy was clear. The Court -- I think I'm reading from page 2545. This is after the discussion we'll all be talking about at some point today. I know the phrase about the quotations from the earlier Supreme Court cases discussing defamation, fraud, etcetera.

And then it goes on to say in those decisions the falsity of the speech at issue is not irrelevant to our analysis but neither was it determinative. And then Justice Kennedy says, the Court has never endorsed the categorical rule the government advances that false statements receive no First Amendment protection.

MR. KAISER: If I didn't say it properly, that's what I'm trying to say.

THE COURT: That's probably what -- fair enough. But isn't that a -- doesn't that strongly infer, and especially in view of the outcome, the six members of the Court agree, this false speech was protected. So we do know some false speech is protected.

MR. KAISER: Yes, some false speech is protected, but I wouldn't say that false speech is protected. Does that make sense? Do you understand what --

THE COURT: False statements do receive some First Amendment protection, true or false?

MR. KAISER: No. Some false statements receive First Amendment protection.

THE COURT: Okay.

MR. KAISER: Some.

THE COURT: I follow you. I understand the distinction.

MR. KAISER: Okay. And I think that's an important distinction because Justice Kennedy articulates two situations where false speech does not afford First Amendment protection because it's not -- it's not Justice Breyer's subsequent balancing analysis. It's a threshold question. And those two things that he articulates, right, are when the harm -- when the speech itself causes harm or when there's a material advantage gained by the speaker. And we have both of those things here in our statute. And I think you hit the nail on the head, Your Honor --

THE COURT: Do you in section (b)?

MR. KAISER: Yes, absolutely.

THE COURT: Why? We're told nothing in section (b) of the statute about what the misrepresentation is required to be. It could be the Boy Scout troop that's getting the tour of the poultry facility and a PETA representative disguised as an assistant Boy Scout leader comes along with them.

MR. KAISER: Sure. It could be an independent journalist. It could be a competitor who wants to -- who

wants to see the newest process and claims that they're from the USDA. I mean it could be anything.

THE COURT: So what's the harm --

MR. KAISER: The harm --

THE COURT: -- and what's the gain?

MR. KAISER: Right. So the harm is you get to be where you otherwise can't be.

THE COURT: That's the harm or the gain?

MR. KAISER: That's -- that's the gain. And I mean it's both. It's the -- it's the -- it's the immediate harm resulting from the falsity. And it's a gain, particularly in an as applied challenge here because, you know, the plaintiffs talk about their --

THE COURT: Well, Mr. Liebman might say that if that PETA representative does nothing more than walk around with the Boy Scout troop through the facility, take the tour that you might otherwise get as a member of the public, and then walks out the door, no harm. Is that true or is that false? Has the business owner been harmed?

MR. KAISER: Yes, the business owner has been harmed.

THE COURT: What's the harm?

MR. KAISER: The business owner and the private property owner have been unable to control who accesses his private property. Now, we've articulated --

THE COURT: The business owner actually did make a determination about whether that person could access. The question is whether --

MR. KAISER: I apologize for interrupting.

THE COURT: No, it's all right. Whether -- whether the person was who they represented to be is the question.

MR. KAISER: Right. Right. And in your hypothetical that's probably the farthest most attenuated type of harm, but that person could have been on five other farms the other day also trying to get information.

THE COURT: That's a different harm, is it?

MR. KAISER: Maybe. It's the right of a private landowner to control who comes into that person's private property.

THE COURT: So what do we do with the tester cases and the housing discrimination? What do we do with the Seventh Circuit case involving the undercover reporters who purport to be patients? What do we do about cases where the courts have said that's a misrepresentation that is protected?

MR. KAISER: Not protected by First Amendment, Your Honor, not covered by common law intrusion or false lying or defamation.

THE COURT: In the tester cases what is it if it's not a First Amendment right? There's a misrepresentation. I'm here to seek housing, and that's not true. The person is

there to obtain information about the housing practices of the landlord for the purpose of testing their compliance with the law. That's a misrepresentation. The courts have sanctioned that -- not sanctioned like penalize, but I mean they've said that's acceptable. That's speech that's a misrepresentation. The courts across the board uniformly said that is not unlawful. It's protected activity.

MR. KAISER: It's protected activity. But when we look at the totality of the cases, what we see is that there's a right to control who comes on your private property. And in the tester cases we're talking about places that the public can otherwise go. I don't know if it makes a difference that we're talking about a place -- a public place where the public can otherwise go.

Certainly when you're talking about a biosecured controlled farm, which, you know, there was legislative testimony that that's equivalent to a house, and processing facilities where there are risks inherent in -- in food safety, food supply safety, and dangers inherent in the -- in the premises itself --

THE COURT: I feel like you just shifted our conversation again. I thought we were talking about whether the misrepresentation could be a protected act of speech, and there are cases that say that it's lawful to make misrepresentations on private property to landowners, and I

think you've -- maybe your answer suggests that it depends on what the land is.

MR. KAISER: I think the tester -- I think the tester cases are distinguishable because of the nature of the testers. The testers are not different from -- from law enforcement folks who can make misrepresentations or who can engage in folks -- engage in undercover operatives. But law enforcement is different from a private party excluding --

THE COURT: The testers aren't law enforcement officers. They're private citizens, like PETA. You could argue whether representatives of PETA are the same or not, but they're not law enforcement. They're private citizens who go in and make a misrepresentation. How is that different than -- let's not make it a PETA representative but some citizen in Utah who feels strongly about animal rights. What's the difference legally between the tester and the person who cares about animal rights? The question is whether the First Amendment extends to protect the misrepresentation of one but not the other on private property to a landowner. Is there a legal distinction?

MR. KAISER: Your Honor, I think -- I think there is. To the extent that the tester cases are -- are protected by the First Amendment and not by other constitutional rights or that the torts don't cover those -- the torts -- the state torts don't cover those acts of conduct. And I apologize that

as I sit here right now I can't recall in those tester cases whether those are First Amendment cases or tort cases.

The Court: Is it your view that the State of Utah could criminalize a misrepresentation made by somebody to a landlord in connection with an application for housing?

MR. KAISER: Yes.

THE COURT: The State could because there's no constitutional First Amendment protection for a misrepresentation?

MR. KAISER: That's right.

THE COURT: And it's made to, what, a private property owner?

MR. KAISER: No. I mean if the misrepresentation itself causes harm, maybe -- maybe that's where we have to go back to, because an application for housing isn't in and of itself causing harm. Here access to an agricultural operation, which I think is an important part to talk about, does in and of itself cause harm.

The Court: What about the misrepresentation made in the employment application for the person who is never hired? Is that protected or not protected?

MR. KAISER: Well, in this case I don't think it matters.

THE COURT: But we're testing the First Amendment right.

MR. KAISER: Sure.

THE COURT: Do I enjoy that First Amendment right if I'm not hired because there was no harm, but if I am hired, it wasn't a protected statement? Is that the distinction --

MR. KAISER: Well --

THE COURT: -- under Alvarez?

MR. KAISER: I think that's a natural result of Alvarez that Justice Kennedy probably didn't -- probably didn't consider.

THE COURT: So is it the State's position that the misrepresentation made on the employment application for the person who is not hired is a protected activity?

MR. KAISER: As a hypothetical matter, I'm really not sure about that answer because how would someone make -- how would someone make a First Amendment claim based on that? You know, how would that -- how would that ever arise as a real claim? I don't know.

I think that Alvarez says that there are -- there are two types of misrepresentations which are excluded from the First Amendment, right? Those who the speech itself causes harm, and the -- when the speech creates a material advantage to the speaker. I think you could probably make an argument that -- that lying on the job application creates a material advantage to the speaker even if the person wasn't hired because the person might be considered higher, they might have

gotten an interview that they didn't otherwise get, they might have gotten consideration more than if they'd lied, right? If I'm a felon and I lie and say I'm not a felon, there are a lot of jobs that that automatically disqualifies me for. So I'm making a material advantage on an employment application that Justice Kennedy recognizes.

THE COURT: I think I keep interrupting you and I think you're trying to tell me what the limiting principle of Alvarez is more generally as it applies here. Is it that the speech that's protected is a misrepresentation from which there's no harm to anyone who receives the misrepresentation and no gain from anyone who makes it? Is that what's required?

MR. KAISER: Yes, I think that's right.

THE COURT: Well, didn't Mr. Alvarez receive a benefit from the misrepresentation? What he sought to do was to elevate his standing with his peers artificially, falsely, without merit. That's the discussion in the case. He received a reputational benefit. So is it a special kind of benefit that is required or any benefit?

MR. KAISER: Well, I don't think it's any benefit. I think material advantage means -- means material. I don't think it means pecuniary but I think it means material.

THE COURT: What does that mean?

MR. KAISER: I don't know. It means -- it means

what it means.

THE COURT: None of us do.

MR. KAISER: No, of course not. I mean I think it means important. And don't forget that Alvarez is about -- is about a broad statute that has no reference to any sort of hook, no benefit, no harm in and of itself, right?

THE COURT: But Congress said otherwise. The Congress thought it was demeaning to Medal of Honor winners, diminished their reputation. And Mr. Alvarez thought it was helpful to make the misrepresentation because it boosted his reputation. So I don't know -- I don't know what principle to apply if you're saying that a misrepresentation like that is covered but one here isn't.

Is it the -- I think the State's position seems to be it's that somewhere down the line that person that we hired under false pretenses may do something that's really damaging to our company. That's the harm, is it?

MR. KAISER: Yes, that's a harm. But I think there's another harm, which is that property owners have a bundle of sticks, a bundle of rights in their property, and one of those is the right to exclude. And this statute directly links the false pretense, the misrepresentation, to the right to exclude.

And I really think that's one of the errors that was made in ALDF versus Otter because the Court said that -- that the

misrepresentations in -- in Idaho's statute, which were to misrepresent to gain access or to misrepresent to gain access to files or information, wasn't tied to any direct harm or benefit. But if you look at the statute, it's right there. The misrepresentation gets you to something you otherwise wouldn't get. And I don't think there's a constitutional right to spy, and that's -- that's what these statutes are protecting against.

You know, let's go back to your corporate espionage hypothetical. Samsung and Apple, maybe they're just after trade secrets, but maybe Samsung is after -- they've heard that Apple is engaging in unfair labor practices and they want to get that information. Well, if it harms Samsung in the process, that's too bad.

But there's never been a constitutional right to engage in sort of misrepresentations or those sorts of recordings -- I'm sorry, I guess I'm going back to the recording part, but I think it applies in both. And we've seen that, right? We've seen it over and over in Supreme Court cases which talk about the -- the media has no right. There's no particular privilege to get information as part of -- as part of information gathering to further their speech interests.

THE COURT: So to be clear so I ensure I understand the State's position when I go back to decide this case, any misrepresentation, any misrepresentation made that enables a

person to gain access to private property for any purpose is necessarily unprotected speech?

MR. KAISER: I have to think about the breadth of your statement there.

THE COURT: What I've understood you to say is it's the nature of the private property interest by the property owner that prohibits any First Amendment protection for a misrepresentation, because it's the right to control who enters my property that supplants any speech right.

MR. KAISER: Well, that a misrepresentation to gain access to private property is --

THE COURT: Unprotected.

MR. KAISER: Unprotected. And it's particularly unprotected here when we're talking about property that is biosecured, that involves sharp knives, that involves dangerous animals, that involves the spread of disease. This property particularly demonstrates that -- that harm that Alvarez is noting. So even -- even if you disagree with me with that overarching principle, it's certainly applicable here. Alvarez' exceptions are certainly applicable to Utah's act.

THE COURT: So the State extracts from the Alvarez decision some responsibility then for the Court to weigh the nature of the private property to determine the strength of the private property owner's right to supplant a First

Amendment misrepresentation right. Is that it?

MR. KAISER: I don't know. I think Alvarez requires the Court to determine whether a falsity has a material benefit or the falsity itself causes harm. And in this statute, whether it's as applied to the plaintiffs or on a facial challenge, there is harm that is protected against by the prohibition of the falsity.

THE COURT: Now, let's get to that point now. Mr. Liebman argued this, and Dean Chemerinsky makes this point, many people have made this point. I think Judge Winmill might have made this point. Some folks maintain that the harm isn't the harm that you're articulating, the right to control access to the property, and not just to control access but to know everything that the property owner wants to know about the person they're granting leave to enter, but the harm was instead the harm that comes months later or weeks later with the publication of something that was in the State's view unlawfully recorded on the premises. It's the reputational harm, an injury, the economic injury, the injury to the business owner and the -- and related business owner, the industry.

MR. KAISER: Sure.

THE COURT: Which is it? You would say it's both. But this statute is drawn to one of those harms more than the other.

MR. KAISER: That's right, the former rather than the later, because unlike Idaho's law, there is no restitution provision. Our law doesn't prohibit publication. Our law doesn't prohibit distribution.

THE COURT: It absolutely does.

MR. KAISER: It absolutely does?

THE COURT: Doesn't it? Necessarily of necessity it criminalizes the distribution because the distribution could only happen if the recording is made.

MR. KAISER: If an unlawful recording is made, absolutely. But look at Bartnicki versus Vopper. That's a case in which unlawful recordings were made and there was no liability for the distribution. Look at all of the other ways in which recordings can be made.

THE COURT: So it's the State's view that the prohibited conduct is not the publication of a video that's recorded on the property?

MR. KAISER: Absolutely not.

THE COURT: Right. Okay. And no harm attendant to that. So the harm that we're focused on in this case is the access to the property under false pretenses, not the recording or publication of the -- of what's viewed there?

MR. KAISER: That's the harm that subsection 2(b) seeks to -- seeks to avoid.

THE COURT: Is there harm from the recording itself

under subsection (c) or (d)?

MR. KAISER: Well, to the extent that a landowner refuses that -- that conduct on their property and folks do it anyway, I think -- I think there's harm there.

THE COURT: And is that harm to the private property interest or private property right?

MR. KAISER: Yes.

THE COURT: And when we've been talking about this private property right -- this is important clarification for the suggestion that will follow after our recess in a moment -- we're talking about whether there exists a First Amendment protection in the first instance?

MR. KAISER: That's right.

THE COURT: When we transition to a discussion, if we get to one -- well, we will have it. I don't know whether intermediate scrutiny will end up applying or if it will be something else. But when we start talking about the important governmental interests that are put forward, we're not talking about property interests or privacy interests, we're talking about the four interests that the State articulated several times in its papers; is that right?

MR. KAISER: Well, no. I think private property and privacy interests are also an important governmental interest.

THE COURT: I was afraid you were going to say that. I mean I went through several times, I went through your

briefs looking for where the State said that, and that's not -- that's not what I read the State to say. At least in two instances you enumerated four specific legitimate government interests that supported the statute, and I didn't see where privacy or property were among them.

If you'll give me a moment, I'll find it. I have too many tabs. There was too much good stuff to read in all these papers. But they were the biosecurity risk, the risk to animals, the risk of injury to coworkers, those four items.

Those are the four items that are discussed in the introduction to your motion for summary judgment and the body of your summary judgment motion, in the argument section of your summary judgment motion, and in your reply in support of your summary judgment motion. And while there are references to private property -- privacy interests and property interest, undefined I think -- my clerk has his finger right on it, as he often does. I guess page 14 is where those are set forth specifically.

MR. KAISER: Of our original motion --

THE COURT: This is your motion for summary judgment. No, that's not right.

MR. KAISER: Yes.

THE COURT: It's the State's response to the plaintiffs' motion for summary judgment, right. So I mean the point here I think is twofold. I was -- I'm trying to ensure

that I understand the State's argument when I go back to conduct our analysis, but part of it is fairness to the plaintiffs in engaging in their -- give me a moment. I actually think it was --

MR. KAISER: Your Honor --

THE COURT: Let me read in a couple places. Roman numeral IX from your opening brief in support of your motion for summary judgment. That wasn't where you laid it out with numerals. But, in any event --

MR. KAISER: Your Honor, I will concede that on page 14 of our opening brief that we say that the Act promotes significant government interests in at least four ways. It protects against animal exposure to infectious disease, and protects against harm to animals caused by unqualified workers, it protects against human exposure to zoonotic disease, and it protects against harm to facility employees caused by unqualified or inattentive workers.

I don't dispute that we did not directly discuss privacy interests and private property interests there, though I would say that -- that our brief and the legislative history is full of discussions about privacy in private property.

THE COURT: Well, let me add to what you said. That discussion, it is on page 14, is under a heading entitled the Act is narrowly tailored to serve a significant governmental interest. And then the analysis that follows on the pages

from 14 through 19 address only those four specific offered rationale. You agree with that?

MR. KAISER: Yes, Your Honor.

The Court: And in one of the other briefs the plaintiffs point out I think by way of criticism in their argument that insofar as the State purports to be relying on privacy rights or property rights in support of this restriction, it's never articulated what that right is, and I couldn't find it. Is there an articulation of the privacy right or property right that the State maintains is a significant governmental interest that this Act is narrowly tailored to serve?

MR. KAISER: Well, I don't know if there's a specific articulation in our briefs, Your Honor. We on page 29, when we were talking about the equal protection challenge, list as rationale bases for the law, but it's mentioned as an important interest in protecting personal privacy in private property, which cites to Otter, which recognizes the important interest in protecting personal privacy in private property.

THE COURT: That's right, thank you. And I want to make sure I'm being fair. I think the State did argue those interests in the context of the equal protection analysis. Do you maintain as you're here today that the State has given the Court and the plaintiffs notice that it intends to assert as part of the intermediate scrutiny test that property interests

or privacy interests are significant governmental interests?

MR. KAISER: In our reply, Your Honor, on page six and seven we mention that a comprehensive view of the Act's history indicates a concern for disease, food safety and privacy under our narrowly tailored analysis. And, no, have we fleshed that out in our briefs? No. But have we been talking about privacy, private property? Plaintiffs have talked about -- have created a standard talking about reasonable expectations of privacy which we've responded to. So --

THE COURT: This is the reason for my question.

MR. KAISER: Okay.

THE COURT: We have for sure talked about privacy interests and property interests, and I guess I'm thinking formulaicly. I'm trying to figure out which bucket those arguments were in. My view was that the State was placing those arguments in buckets -- I think you're right about rational basis review under equal protection, and also under the existence of the First Amendment right in the first instance, but the State wasn't dropping those arguments in the intermediate scrutiny bucket. And if you think otherwise, then I have a different question for you.

MR. KAISER: We have not articulated those in the intermediate scrutiny.

THE COURT: Okay.

MR. KAISER: I think the arguments that we articulated in the threshold question and rational basis could still apply because I believe the Court could find privacy and private property important governmental interests just as Judge Winmill did in Otter.

THE COURT: I guess my response to that, and maybe it's -- we've already spent more time on this now than it's worth. I just want to make sure I'm giving due weight to all the arguments, but I don't know -- that doesn't strike me as helpful to the Court's analysis. I mean it seems like those are just general principles that we could articulate in any context without any tethering to the language of the statute, the intent of the legislature or the like.

But that's -- that's subject matter that we'll take up after the recess. I think we have a lot to talk about still in terms of legislative intent, purpose and the like. Was there -- but, Mr. Kaiser, I was pulling you all over the place. Was there something more you wanted to say about the existence of a First Amendment right or the implication of any First Amendment rights under section (b) or otherwise under the statute?

MR. KAISER: Well, Your Honor, I'm hopeful that I covered everything that I planned to say, and I think I might have been pulling you more places than you were pulling me. I think it's important to consider that if the plaintiffs'

argument prevails, that there's a right to lie to get access to places that you're not otherwise able to go, then there's a right to spy. There's a constitutional right to spy. And I think that's a pretty important and pretty serious door that's being opened.

And even if the Court says, well, we can apply some sort of level of scrutiny to it, that subjects all sorts of laws to First Amendment challenge that -- that never would have been in the past and no court has said exists. For example, GRAMA prohibits a person who by false pretenses, bribery or theft, gains access to or obtains a copy of a GRAMA protected record to which the person is not legally entitled is guilty of a Class B misdemeanor.

Well, we have, you know, false pretenses here. And could someone lie and say, yeah, I'm -- you know, I'm a governmental official. I need to look at these. Someone who is the subject of a criminal investigation could come in and say I'm a cop and I need to look at these documents. That would subject that law to a First Amendment challenge.

THE COURT: Do you draw any distinction in your mind -- I thought -- I can't tell you how many hours I've spent thinking about these issues and trying to understand them. Is there a distinction in your mind for example between a law that criminalizes making a false statement to the NSA in order to obtain employment with the NSA and a law that

prohibits or criminalizes making a misrepresentation to Taco Bell to obtain employment with Taco Bell?

MR. KAISER: It's a distinction of degree but not of -- not of legal import. I mean are we more concerned that folks in the NSA are thoroughly vetted than we are the people who work at Taco Bell? Perhaps, but the legal principles still apply.

THE COURT: That's what I'm wondering. But maybe -- let me -- help me understand why this is the wrong way to think about this concept then. I think -- I've been thinking about it in terms of an initial threshold question about whether that misrepresentation is a protected speech right in the first instance. Now, in one instance I'm making it to a governmental entity and one to a private entity, and I don't know that that makes a difference.

MR. KAISER: I agree.

THE COURT: If it is a protected right, then we're talking about different rationale that might support the criminalization of that statement, State secrets, and the necessity of protecting State secrets on the one hand, or maybe it's KFC and it's the Colonel's secret recipe. But that's trade secret law, and there are laws that deal with the dissemination -- or collection and dissemination of trade secrets.

I agree, you can't go into the company's files, corporate

espionage, separately actionable, tort remedies. Are we criminal -- is the State, any state, not just Utah, the government, going to criminalize the misrepresentation in the employment application? Is it -- and if so, is it on the basis of the justification -- which we'll talk about later maybe under strict or intermediate scrutiny -- or is it that there was just never any right -- that you didn't have a right in the first instance so the government doesn't have to justify it. We can criminalize any misrepresentation in an employment application.

MR. KAISER: Well, so long as the misrepresentation creates a material benefit for the speaker or causes harm, the misrepresentation itself. And I think you probably have to look at employment application, employment application, but your Taco Bell person could be a registered sex offender.

THE COURT: But the State I think you would say can make it a crime to make a misstatement on your resume. Anybody in this state who makes a misrepresentation on a resume and submits it to an employer with an employment application is guilty of a misdemeanor. That would be constitutional. Now, whether it would be good policy or not is a different question.

But your point is that's constitutional because that misrepresentation carries no protection because there's a harm to the prospective employer and a potential gain to the person

who made the misstatement on the resume. It's subject to criminal regulation, not subject to any speech protection.

MR. KAISER: That's right.

THE COURT: That's the State's view?

MR. KAISER: I think that's right.

THE COURT: That's where I've understood us to land. Okay. Thank you, Mr. Kaiser.

Mr. Liebman, that was a long discussion. Before we close that chapter, I do want to give you a chance to respond if anything else arose that you wanted to touch on briefly, please. And by briefly I don't mean quickly. I will tell you you were speaking quickly and smoke was starting to come from Mr. Fenlon's transcription device.

MR. LIEBMAN: I will be brief but not quick.

THE COURT: Thank you.

MR. LIEBMAN: There's two points that I want to address here. The first is this question of the extent to which the First Amendment applies on private property. And it's simply not the case, as the State would have it, that property rights extinguish First Amendment rights.

THE COURT: You don't surrender them at the door.

MR. LIEBMAN: You don't. And if it were the case that First Amendment rights vanished at the property boundary, a lot of crucial First Amendment cases would have come out differently. First example is R.A.V. versus St. Paul. This

is the case where someone burned a cross on their neighbor's lawn. And if it were the case that categorically there are no First Amendment rights on private property, the Court would have resolved that question in that way and affirmed the conviction and been done with it. But instead the Court invalidated the statute, subjected it to a content-neutrality analysis and held that a content-based restraint on speech, even speech that's otherwise not even protected, fighting words, is still unconstitutional.

THE COURT: You can be prosecuted for trespass but not for the speech.

MR. LIEBMAN: That's right. That's exactly right. And, again, we're talking about people who are otherwise lawfully present. We're not talking about a right to, you know, wave your press credentials to get onto somebody's property. We're talking about people who are otherwise lawfully present.

THE COURT: But Mr. Kaiser says that's a misnomer. You're not lawfully present if I let you in the door believing you were there to deliver Girl Scout cookies and in fact you were there to plant a bug so that you could listen to what happens in my bedroom.

MR. LIEBMAN: Well, the cases are consistent that a misrepresentation does not vitiate consent in a way that rises to the level of trespass. That's the Desnick case from the

Seventh Circuit and numerous other ones that we cite in our brief.

THE COURT: I didn't see that the Tenth Circuit has spoken on that issue. Do you agree?

MR. LIEBMAN: I agree with that. There's not a Tenth Circuit case on that. I think it's also important to note that you have to distinguish between the right of the private property owner to exclude certain speech on the one hand and the right of the government on the other hand to criminalize that speech. We would certainly concede that a factory farm has the right to prohibit filming, has the right to fire anyone that it catches filming, has the right to kick people out if they catch them filming. But once the government gets involved, there's a state action issue and the First Amendment is implicated because the government is criminalizing the speech.

THE COURT: And you would say along those lines I think that if you make a misrepresentation in your employment application, we can terminate your employment?

MR. LIEBMAN: Exactly.

THE COURT: And if you did something else that caused us harm here, we can sue you for that. We have civil remedies is what you'd say, and that's a different consideration than government action directed to the same misstatement?

MR. LIEBMAN: That's right. And certainly the government enforcing the terms of a contract through the civil law is something that's drastically different from the government criminalizing speech through the criminal law.

The second point -- well, let me make -- give a couple more examples of the application of free speech on private property to refute the idea that somehow those rights vanish once you cross private property. For example in the defamation cases, it really doesn't matter where you utter the ostensibly defamatory comment. Even if it's done on private property, you have the protections against liability that New York Times versus Sullivan establishes.

If I utter a bad word against somebody at Taco Bell, it doesn't mean that I don't still have a right to not be liable unless someone can show that I said that statement with actual malice. And so the First Amendment doctrines pervade speech regardless of where it takes place.

The Rideout case is another example. In that case the ballot selfies were taken at polling places. Many polling places are private property, such as a church or a private school or someone's home, and they were posted on Facebook, which is not public property, and nevertheless the Court found a First Amendment right.

So it's simply not the case that the public/private distinction is determinative. The question is whether or not

the government has an interest in restraining speech and the private property question really isn't determinative on that point.

The second point I want to make is on the misrepresentations issue in Alvarez and this question about what constitutes a legally cognizable harm. And I think the State's construction of the legally cognizable harm is so loose that it would make this exception swallow the rule. If we -- you know, people lie for all kinds of reasons. They perceive some benefit to doing so. And if it were the case that any conceivable benefit to the person telling the lie were adequate, then the government could criminalize all kinds of false speech.

Instead, what Alvarez demands is that there be a legally cognizable harm and that it be material. So we need something specific, something tangible, and something that, you know, is fraudulent or that deprives someone else of their property.

THE COURT: Now I'm just talking out loud, and I'll invite Mr. Kaiser to respond to this if he cares before we recess. But doesn't the State's reading of Alvarez say that the only misrepresentations that are protected are those that don't matter at all, and those that are most important to the speaker aren't protected? And does that turn the First Amendment protection on its head? I don't know.

MR. LIEBMAN: I think that's exactly right. That's

the exception that swallows the rule. I mean --

THE COURT: Is that what you just said and I made it my idea? Just like a judge to do that. I'm sorry, go ahead.

MR. LIEBMAN: Right. And I think Your Honor was right in your questioning of Mr. Kaiser on this question of whether -- you know, Mr. Alvarez gained something. It was credibility and respect from his constituents, at least until a couple days later when he was out as having lied. And there was a harm to true recipients of the Medal of Honor who were offended by the fact that he claimed to have received it.

And, you know, even in Alvarez there's some conceivable benefit to the person who told the lie and some conceivable harm to the people who heard the lie, nevertheless, that's not sufficient. It has to be material. It has to be legally cognizable. And merely gaining access to a facility is not legally cognizable. It's the sort of psychic harm that the court found inadequate in Alvarez.

You know, and we could think of all kinds of lies told to gain access, for example, the false friend that comes to your dinner party pretending, you know, that they like you. If that's punishable, then so too are the testers who go in under the -- get access to the office, apartment, on the pretense of being there to receive housing. And so it's simply not the case that lies told to gain access are the kind of legally

cognizable harm that Alvarez contemplates.

I'll leave it there.

THE COURT: Mr. Kaiser, you were writing furiously at one point in that discussion. Was there a final point before we take our recess?

MR. KAISER: Oh, Your Honor, I'm not sure. I would say that -- that the material -- when we're talking about this statute, and as we talk about overarching rules, they're difficult to apply, and I think that the situation might change sometimes. But when we look at this statute, there is material harm because we're talking about access to an animal agricultural operation and not someone's dinner party.

THE COURT: I think that goes to the argument we'll have after the recess, the application of the statute.

MR. KAISER: All right. Then I'm finished. We can take our break.

THE COURT: Let's take 10 minutes and come back and do some more work. Thank you, everyone.

(RECESS FROM 3:08 PM UNTIL 3:24 PM)

THE COURT: All right. Based on that exchange, I think there's probably only about 14 hours of argument left. We'll all be fine. Kidding. I'd like to pivot now to -- I think if the Court finds that there is no First Amendment right implicated, I think we're finished as a practical matter. If there are First Amendment rights implicated, I

guess an initial question I want to put to both of you -- it's not addressed in the papers but it occurred to me -- and then I think I'd like to talk now about what I think is the second step in the Court's inquiry. But if I split out subsection (b) as a misrepresentation and analyze that separately and differently than the recording prohibitions in A, C and D -- and I'm not by this question intending to signal anything. I haven't made any decisions about this. But if I find for example that one or the other of misrepresentation or recording implicate a First Amendment interest but not both, I think the Court's response to the summary judgment motions is to strike -- if -- if that portion of the statute fails under whatever scrutiny follows, we would strike a portion of the statute but not the whole statute. You both agree with that?

Mr. Kaiser?

MR. KAISER: I do, Your Honor. And severability is a matter of state law, but the Utah Supreme Court has said so long as -- I apologize. So long as the interests that the legislature sought to protect are still available under the strict -- the new revised statute, then the statute should be severed, and that would occur here. We've got four different types of harms that the legislature tried to stop. If they're not interrelated at all, you could absolutely sever them if the Court believes that some parts of the statute are constitutional and some aren't.

THE COURT: Well, and is the same true in your view, Mr. Kaiser, for example, that suppose we conclude that subsection (b) misrepresentation implicates a First Amendment right under Alvarez or otherwise but that there's not a First Amendment interest implicated by recording, then we would proceed into the substantive analysis only on the section that remains?

MR. KAISER: Yes, sir.

THE COURT: And it would rise or fall independently?

MR. KAISER: Yes.

THE COURT: Do you see it differently, Mr. Liebman?

MR. LIEBMAN: I do, or we would at least want the opportunity to possibly brief that question. I think Mr. Kaiser states the standard correctly as to whether or not the legislature would pass the revised version as it stands, and I would want to look more closely at the legislative history to determine that, you know, the majority of the conversation was about recording rather than misrepresentations, and it might be an open question that could be briefed.

THE COURT: So this is not a question that was addressed in the briefing, but it's implicated by the motions in my view. I'll tell you that I -- I think it's -- it seems to me that it's severable. If either of you disagree with that proposition, I'll invite you to submit a brief, please,

setting forth your position within 10 days of today. What is today, Tuesday? So that would -- okay. So that won't drop you on a weekend. All right. Within 10 days of today then, if you wish to be heard on that question, and I don't know whether it will be implicated or not.

All right. Let's turn to content-based and viewpoint-based restrictions. I think - I'm going to speak in general terms now, but I think strict scrutiny will apply if this statute is -- if we find that there's a First Amendment interest, and it's -- the statute is content-based or viewpoint-based in its infringement on that right. Otherwise, if neither of those are the case, then we'll apply intermediate scrutiny. I think that's the next step. Do you both agree with that statement as a general proposition?

MR. KAISER: Yes, Your Honor.

MR. LIEBMAN: Yes, Your Honor.

THE COURT: All right. So let's talk about content-based and viewpoint-based, I think probably more likely content-based. As I understand the viewpoint-based law, that's a pretty rigorous challenge for somebody.

Mr. Liebman, you got to start last time. Why don't we start Mr. Kaiser with the State this time, should we?

Is the -- is the statute content-based in its application?

MR. KAISER: No.

THE COURT: And do we know that because we can read it, the plain language in the first instance, and it says nothing about the content of the communication or the recording that's prohibited?

MR. KAISER: That's right.

THE COURT: And if that's true, do we just stop there or do we then go on to consider whether there was discriminatory intent by the legislature?

MR. KAISER: We stop there. And the authority for that is the Tenth Circuit case, the Planned Parenthood of Kansas and Mid-Missouri versus Moser. And, you know, the U.S. Supreme Court has talked about the -- whether a neutral law can be content or viewpoint-based based upon the purpose of the statute. It mentioned that in Ward and it's been restated again in Reed. But the Court has never applied that. It's never said the plain language of a statute is content-neutral, but we're going to look to someplace else to find some sort of legislative purpose in the First Amendment arena and subject the statute to a higher level of scrutiny.

THE COURT: So what do we do -- I'm posing this now as a hypothetical. We'll talk in a moment I think about the legislative history. But let's just pretend, because it's not the case, I don't think, necessarily, all of the legislative history was fiercely and antagonistically directed toward shutting down these animal rights, domestic terrorist groups,

and let's think of all kinds of inflammatory language we might use. Suppose that if we got to legislative history and looked at it, all of us would blush with embarrassment about the things that were said in open forums. That doesn't matter in your view if the face of the statute is neutral in application?

MR. KAISER: Right, because the standard is whether the law is justified without reference to -- to the content of the speech.

THE COURT: And -- go ahead. You weren't finished.

MR. KAISER: I probably was finished. And the justification here are -- not only is the statute facially neutral, content-neutral, but the justifications that the State has asserted are content-neutral.

THE COURT: Those being the governmental interests that we talked about earlier?

MR. KAISER: That's right.

THE COURT: The four governmental interests that we would apply in whatever level of scrutiny we move to next. And this is true also in your view, even if everyone in this courtroom agreed that this statute would never be applied to someone who violated the statute by going onto the property for example and creating a puff piece about how spectacular one of the poultry farms in Utah was that integrates

alternative sources of energy, it's got windmills and solar, and the chickens listen to Beethoven, and there's little spas, and they eat steak for dinner, and whatever -- I don't know if chickens eat steak. But the point is everybody understands the statute would never be applied to somebody who did something favorable to the agricultural industry that's at issue, everybody understands it would only ever be applied to people who promulgated films like those we've seen elsewhere?

MR. KAISER: Yes. And the Supreme Court has told us so in the two -- two of the three abortion buffer zone cases. There was an argument made that in one of the buffer zone cases -- I think it was McConklin but I can't recall if it was McConklin or Hill -- where the -- I think it -- maybe it was in Hill, because you were -- the abortion opponents said, well, wait a minute. People within the buffer zone who are -- who are taking folks into the clinic for their health care will certainly communicate with these folks, and it's going to be applied inconsistently. And the Supreme Court said, well, maybe you'll have a claim later against -- against government officials for applying the statute in an unconstitutional manner, but that did not mean that the statute was content-based or viewpoint-based.

And the other thing that we take from Hill too is that -- that the statute itself was defined -- apologize. The statute itself was defined with the -- oh, yes. The law prohibited

getting within eight feet and communicating with the purpose of protest, education or counseling. That was -- those were specific things that particularly focused on the content of the message. And the Supreme Court said that didn't make it content-based. And the statute simply empowers private citizens entering health care facility within the ability -- with the ability to prevent a speaker who was within eight feet and advancing from communicating a message they didn't want to hear. So the Court said that even though that was the content that was prohibited, even that wasn't a content-based restriction.

I imagine you're probably going to get to plaintiffs "of" arguments here pretty soon, the preposition of, recording of the agricultural operation. I don't know if the Court is interested in that.

THE COURT: I'll be pressing Mr. Liebman about that. I may part ways with the plaintiffs on their view about how that -- I mean that clause is defined and it reads fairly clearly to me. Maybe he'll persuade me otherwise. But I did want to press you about something the State said in its reply that I think -- maybe I'm just reading it too narrowly, but this actually caused me some concern about whether I had this wrong in my mind.

The State says in its reply on this point that enforcement authorities need only determine whether the

recording was made on an agricultural operation to conclude whether the recording violates the Act. That's false. I need to know more than whether the recording was on the -- I need to know about the facts and circumstances under which it was made. Was it made with the consent of the owner? Was it made by someone who is lawfully permitted to be there.

Early in -- elsewhere in your papers you say whistleblowers can lawfully do this sort of thing, but then you next say the recording's message is irrelevant. And I think that was really the point. You don't have to view the recording to know whether it falls within or without the statute. You just need to know the circumstances under which it was made. Is that right?

MR. KAISER: That's right, Your Honor.

THE COURT: And so is that evidence then that it's content-neutral?

MR. KAISER: That's right. And beyond that the Supreme Court in Hill said the mere fact that a law enforcement officer would have to view the content -- view the recording doesn't even make it -- make a regulation content-based, because all the time law enforcement officers review -- review evidence to determine whether conduct falls within the proscribed statute. And I believe this is in the Hill case.

And, I'm sorry, I thought I had this. Oh, here we go.

Whether a particular statement constitutes a threat, blackmail, agreement to fix prices, etcetera, often depends upon the precise content of the statement. This court, however, has never held that it is improper to look at a statement's content in order to determine whether a rule of law applies to a course of conduct.

So whether the -- whether the officer would have to actually watch the video plus know about the other circumstances that the Court has just pointed out, that still doesn't make the -- the regulation content-based.

THE COURT: And I suppose -- I only know about Ms. Meyer, maybe I knew more when we were on the motion to dismiss stage, but what I think I took from the papers here was that law enforcement eventually reviewed what she recorded but not for the purpose of determining the content but whether the recording had been made on the public road or whether she had crossed a fence.

MR. KAISER: That's right.

THE COURT: That's the sort of thing you're talking about?

MR. KAISER: That's right.

THE COURT: Not bearing on the content but the manner and circumstances in which the recording was made?

MR. KAISER: That's right.

THE COURT: If it -- if the Court concludes that the

statute is content-neutral, do we reach viewpoint?

MR. KAISER: No.

THE COURT: Let's talk about legislative intent for a moment. How in the world is a trial court supposed to determine discriminatory intent and legislative intent?

MR. KAISER: Your Honor, I'm glad that I'm not in your chair because that's -- I don't know the answer, and we've had 200 years of jurists trying to argue about how to do that. I think legislative intent is expressed through the words of the statute, viewed from the purposes that the statute is intended to protect.

THE COURT: And how do we determine the purposes that the statute was intended to protect? That seems to me it's the same question as the legislative intent. And on this point the State -- it's interesting. I just use this as an example. So the plaintiffs point to things that some representative said on the floor or in house discussion as evidence of animus. The State could easily point to statements that other representatives made about other motivations, states rights, property interests. We could have 30 different statements by 30 different legislators on 30 different things. There could be a vote. The bill could pass. I have no idea why, do I, unless there's an express articulation somewhere that there's a common shared or majority interest or purpose? Maybe the statute says this is

the purpose of the statute. I see that sometimes, and that's not here.

MR. KAISER: No.

THE COURT: I genuinely don't know how. And there is so much case law on this. If you're the Supreme Court you seem to just divine the legislative intent. As a trial court I don't know how to do it.

MR. KAISER: I think it's nearly impossible, and it's certainly impossible from statements of legislators. I think a statement of legislative intent in the bill is helpful. I think -- you know, oftentimes we're talking about two different types of discernment of legislative intent. The first is what do the words mean, right? If we were for example looking at what false pretenses means, maybe we should go back to committee hearings or what's going on in the world or testimony or concerns that the legislature might have had to determine what false pretenses means.

But to determine this part, what -- the purpose, why the legislature passed the law, not what the law means, but why they passed the law is impossible outside of a statement of legislative intent. And -- which is why the Tenth Circuit has said let's not do it in First Amendment cases. And most of that review is limited to equal protection claims.

THE COURT: So then what do I do with the State's proffered justifications for the law when we get to scrutiny

in the next step? There's four justifications offered here. I'll tell you I've searched through -- we've searched through the legislative history. I don't know that the word biosecurity appears anywhere --

MR. KAISER: No, Your Honor.

THE COURT: -- anywhere in the legislative history. It's the first justification that's offered after the fact in this litigation in support of the governmental purpose that's served by the bill -- by the law rather. I guess it's a secondary question because we're focusing in the first instance on legislative intent, but I don't know what to make of that either. Most courts seem just to credit what the state says after the fact when we get here, but certainly on rational basis review there's almost no independent screening of that. It appears like on intermediate scrutiny or strict scrutiny I'm supposed to do something more.

And then we've seen this most recently in the election cases in federal district courts this summer striking down portions of some voting restrictions, where courts have appeared to scrutinize a little bit whether there was -- whether the justifications for the limitations were really those that the legislature had in mind. There was the abortion -- the Texas abortion clinic case last term in the Supreme Court where the Supreme Court rejected I think the explanations offered by the state after the fact.

What's a trial court to do with that? When the State comes forward with the four justifications here when we get to the next step of this discussion, do I test them at all? Do I just accept that those were the real purposes motivating the legislators? And if so, how do we know that? What evidence do we have of that? And what's the implication here where the -- as I understand it the legislators who are identified as witnesses who would have discoverable information quite properly invoked legislative privilege, which they're entitled to do. And I think there's a risk about walking into federal courts every time there's a challenge over a statute and putting legislators on the stand and under oath to talk about what -- this is our democracy. I'm totally puzzled.

MR. KAISER: Well, there are a few answers that I do have for you, Your Honor.

THE COURT: I thought you might.

MR. KAISER: The first is, despite the puzzling state of the law, the -- there is no First Amendment -- there are no cases about the legislative intent in the First Amendment arena that prohibit the government from providing information after the fact of the -- of the passage of the bill.

THE COURT: How? Through experts? Through people that weren't present at the time and don't have personal knowledge about what motivated it or else some other way?

MR. KAISER: In this case it's not about an individual legislator's or the legislator as a whole -- legislature as a whole purposes, it's about the government purposes, so the government can articulate those purposes. And in fact in the First Circuit case that the plaintiffs just cited to you, the ballot selfie case, there was very little discussion about the legislative history, but the government came in and brought additional evidence about -- about voter fraud and supplemented the record, if you will, with that. And there was no discussion that that was improper in an intermediate scrutiny case in a First Amendment claim.

So the articulations of the government interests and the information -- the difference between intermediate scrutiny and rational basis is I can come up in a rational basis and say, Your Honor, here are the 15 reasons that this -- that this law makes sense, and I don't -- I don't need any evidence that that's the case. And we can sit here and you can say, yes, that makes sense. In cases like City of Cleburne -- now we're really jumping forward -- we can say but your -- your rationale doesn't fit the distinction.

In an intermediate scrutiny case the government must present some evidence that shows the important government interest and how the statute relates to that, and we've done that in this case. If the court were to require only information that the legislature considered, that would be an

extremely high bar in many, many, many cases that we're subject to anything more than rational basis scrutiny.

And, you know, our legislature is part-time. Our hearings are very short. They have a lot to do in a very, very limited period of time, and to make that exacting requirement under the constitution would be a serious federalism concern and just practically overly burdensome.

THE COURT: And I don't know that it's helpful, but, more importantly, I don't see that it's required. These are just questions.

MR. KAISER: Okay. All right.

THE COURT: All right, discriminatory intent. There's language in the record, and the plaintiffs point to it, that is colorful, inflammatory perhaps, and there are characterizations of animal rights groups and the like. There are legislators who at the time that they were considering this bill expressed their personal feelings about these organizations and the propriety of the work that they do. What relevance does that have to determining discriminatory intent or legislative intent?

MR. KAISER: None.

THE COURT: For the reasons we've touched on, there's too many justifications to count --

MR. KAISER: That's right.

THE COURT: So a handful of legislators who have one

view, even if it was only that view, that's not sufficient to establish discriminatory intent among the body?

MR. KAISER: That's right. And there's case law to support that position. I think particularly the Hill versus Colorado case, because there -- I believe it was Justice Ginsburg that wrote that opinion. And she said, well, wait a minute. Everybody knows that the reason that there was a ban on handbilling in airports was because people didn't like what the Hare Krishnas were doing. Everybody knows that the reason that there was a ban on protesting outside a house in Frisby versus Schultz was because antiabortion folks were protesting and it was -- it was a problem. Everybody knows that the reasons that there are buffer zones around women's healthcare facilities or hospitals in the two cases was because of harassment caused largely by antiabortion protesters. But the mere fact that the legislation was targeted at a particular conduct, particular group's conduct, doesn't mean that the statute became content-based or viewpoint-based.

And so even if we say the reason that those particular legislators enacted this law was because they didn't like the conduct that undercover animal rights activists were engaging in, that doesn't mean that the statute is content-based.

THE COURT: So let's pull the sheet back a little bit. Some folks at least will argue, maybe Mr. Liebman will, and if nobody in court argues, there will be people in public

at large who have an interest in this case who will say, you're kidding me. There were some exposés involving animal cruelty that were published by animal rights groups, and the next thing you know there's a wave of legislation in states prohibiting this very conduct. It happened in Idaho and it happened in Utah, it happened in a handful of agricultural states. Everybody knew and understood what was happening. This was an intent to stop people from making videos like this in places like that and then circulating them in the public.

And everyone will say -- not everyone. These people would say, you just have to look at the circumstances in which the legislation was passed in the states, and where it came from, how similar it is, and the fact that it is uniquely legislation like in Utah and Idaho and elsewhere, is uniquely crafted to prevent the very thing that everybody understood they were trying to prevent, and some of the legislators said that expressly. And so what's the legal response to that? That it's irrelevant, is that the legal response?

MR. KAISER: The legal response is that a law is content-neutral when --

(DRILLING SOUND)

THE COURT: We periodically just drill things in the courthouse.

MR. KAISER: Good to know that the courthouse is being --

THE COURT: We haven't tased anybody in this courtroom though for months.

MR. KAISER: That's also good to know.

THE COURT: Go ahead.

MR. KAISER: The important -- the legal test is whether the statute is justified without regard to the content of the speech. And we have four Supreme Court cases that recognize that the driving force of a -- of a piece of legislation doesn't mean that it's content-based because it's --

THE COURT: But what about discriminatory intent, not content-based but discriminatory intent?

MR. KAISER: The sort of extra part of Ward that the Supreme Court has never -- has never applied?

THE COURT: Right. I don't know.

MR. KAISER: Well, I mean the Supreme -- because we have four Supreme Court cases that all targeted very particularized conduct by very particularized groups, and the Supreme Court has never held that part of the Ward test to apply to any of those situations, despite the protestations of a number of dissenters, that to me says the discriminatory intent has to come from the statute itself. And we've got plenty of law that talks about that, right?

THE COURT: The cases you'd rely primarily on are those you've identified I think.

MR. KAISER: That's right. And of course there's a little part that you were talking about, attacking this particular conduct or these particular folks, and the Chief Justice in McCullen noted that -- that states adopt laws to address the problems that confront them. The First Amendment doesn't require states to regulate problems that don't exist. When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts speech less not more.

And I know that in our last oral argument you asked about why doesn't the State restrict surreptitious recording at childcare facilities or at Google? And the answer is because the harms that have been presented to the legislature created this statute, and the legislature shouldn't restrict more speech when the harms aren't apparent to them.

THE COURT: Well, and I think I understand from the case law that the legislature need not regulate an entire industry. It's permissible for the legislature to say here is the agricultural industry. Here is an instance. We'll regulate that. And later if we choose we can take it up in fast food.

I don't think we're going to reach this discussion, the related issue, today because I don't think we're going to get into rational basis review under the equal protection challenge. I don't think it will be helpful for us to have

much discussion about that today. But it did have me thinking about this question, discriminatory intent and its cousin I suppose, animus, in that context.

And there's no evidence of this, so we're just talking out loud again. But I think commentators and the public at large that have an interest in this issue might say, well, wait, the statute is not designed to punish animal rights groups, even if that's what they -- legislators thought would happen. It was designed to provide some protection for certain agricultural interests. How does that argument unfold in your view in that animus analysis?

MR. KAISER: Well, we have a whole -- I have a whole lot to say about animus, and --

THE COURT: We don't need to say a lot about it. But what do you think about that issue? Because it's related in my mind. They're different. I understand they're different than discriminatory intent. But even if this legislature sought to give protection to the agricultural industry in Utah and it knew that one consequence of that would be to diminish access for groups that otherwise want it, does that mean that it's animated by an intent to harm?

MR. KAISER: No, no. I wish I had a case law citation, but there are always winners and always losers in legislation, and whether someone gets a contract and someone doesn't because of a fear of big oil versus a small town

operation or because one group wants to advance the country one way and one group wants to advance the country the other way, that doesn't equate to an intent to harm either under a First Amendment or an animus analysis.

And, you know, the animus analysis really comes from footnote four of Carolene Products.

THE COURT: I really don't want to get too much into animus. It's not going to be helpful to our oral argument, but thank you. I've confronted this before. This is no mystery. And I don't understand it exactly what the legal framework is that I'm supposed to apply in that context and I've tried. But I'm not -- it will only arise in this case if we get to the equal protection challenge I think, and even then under the rational basis review I think, whether we heighten it through some demonstration of animus. Do you think that's how it applies here?

MR. KAISER: I think that's right, Your Honor. And despite the murkiness in the case law, what we know is what the Supreme Court has decided, and the Supreme Court has decided cases that says regardless of the effect on a particular group, if the justifications for the law are content-neutral, and if you can reference -- if you can decide the law without looking at the expression prohibited in the law, then it's content-neutral, and that's what we've got here.

THE COURT: Thank you.

Mr. Liebman, it is content-neutral on its face, is it not? You disagree?

MR. LIEBMAN: I do disagree, Your Honor. And I think the fact that subsections (a), (c) and (d) all criminalize the collection of images of an agricultural operation makes it content-based on its face.

And let me -- the ballot selfie case -- not the Rideout one, the other one that we mention. This is the Indiana case. In that case the Court found the statute content-based because it prohibited taking an image of the ballot. And the Court italicized to post the ballot as evidence that that statute was content-neutral. And that's not a case that we cited in our brief so I can give you the citation if you'd like.

THE COURT: Would you, please.

MR. LIEBMAN: Yes. 2015 Westlaw 12030168 at page three. And the same applies here. There are things you can take an image of at an agricultural operation that are not of the agricultural operation.

THE COURT: But is that true the way the clause agricultural operation is defined in the statute? Just on its face I'm told, as used in the section, agricultural operation means private property used for the production of livestock, poultry, livestock products or poultry products. And so when we're told -- I mean the phrase of the agricultural operation

appears -- I counted them earlier. Is it seven times in the statute? Doesn't that mean it's a location, not content? And then does that draw us to McCullen?

MR. LIEBMAN: It doesn't, Your Honor. I mean in McCullen you can violate the statute merely by being present within the buffer zone. So that truly was about where you were and not about what you were saying or even whether you were saying anything.

THE COURT: But isn't that true here also? If you've recorded an image in a geographic location of an agricultural operation, irrespective of what's in that recording, you've fallen within the statute, no?

MR. LIEBMAN: No. I mean imagine if you were standing in the field of an agricultural operation and pointed the camera at the sky to take a picture of the clouds. That would not be an image of the agricultural operation, but it would be taken at the agricultural operation. So you could take photos at the agricultural operation that are not of the agricultural operation. And we also give the example if you do a close-up of a birthday cake in the break room.

THE COURT: Use the cloud example one more time. What was the very last thing you said? So then you've taken a picture --

MR. LIEBMAN: At the agricultural operation.

THE COURT: But not of the agricultural operation?

MR. LIEBMAN: That's right.

THE COURT: Right. And you did talk about the break room example. But the break room example falls within the statute for sure, doesn't it?

MR. LIEBMAN: I don't think so. I mean it really depends on what's within the viewfinder of the camera. I mean if it's zoomed in close enough on the cake, it's of the cake and not of the agricultural operation. And in fact this is borne out in the legislative history at page 21 and 22 of the transcript. Representative Mathis, who is the sponsor, actually says the statute doesn't apply to, quote, barns, houses, fences, rock piles, things that we like to photograph, end quote. And this is where he's saying this isn't going to apply to you people who just want to take a pretty picture of the barn or the sunset. It's targeted at the animal rights activists that are taking pictures of the slaughtered cow.

THE COURT: You agree with Mr. Kaiser though on this point that under the law I don't reach that question if the statute is plain on its face and it's content-neutral, or do you disagree?

MR. LIEBMAN: I certainly disagree. And, you know, the Supreme Court has reiterated that numerous times, and I'll come to that in just a moment. But I think this is a different use of legislative history. If there's some ambiguity about what of means, then looking to legislative

history to clarify that term is different than looking at legislative history to determine the underlying motive.

So this is a slightly different use of legislative history to clarify what might be an ambiguity, if there's any ambiguity about the term of. But the plain meaning of of is what something relates to, and a picture of something is that which is within the frame of the photograph or the video and that is by definition content-based.

And so one --

THE COURT: On its face why doesn't the statute apply to the home or the rock pile that's on the private property of the agricultural operation the way its defined?

MR. LIEBMAN: Well, I mean those are not the operation of the facility, an agricultural operation as Representative Mathis intended the term. And, again, we're talking about the sponsor of the legislation, the person who --

THE COURT: But what if all of his colleagues disagreed?

MR. LIEBMAN: Well, I mean --

THE COURT: So is the intent of the -- is the meaning of the statute drawn from the intent of a single legislator, the sponsor, or shall we select someone else?

MR. LIEBMAN: Well, no one else has opined on that specific question in the legislative history about what kinds

of things are or are not covered. And I would agree that you don't have to get to that unless there's some ambiguity of of. I think this is an easy case at the very threshold for the same reason that the Indiana ballot selfie case was. If it says a picture of something, you've got to look at the picture to figure out what it's of, and that's by definition content-based on its face. But if there's some ambiguity, then looking to the legislative history and the person who drafted it I think has a special authority to say what the statute covers and what it doesn't.

THE COURT: I'll candidly acknowledge I didn't, in preparation for our hearing, find -- I didn't go searching for that case. I'll read it before we decide this issue, but -- and you make this argument in your -- I think it's in your reply in support of your own motion, but in the -- I have the statute in front of me. Where in the statute do you find the ambiguity? For example, if we look under subsection (d) we're told that it's a violation -- that if without the consent of the property owner you knowingly or intentionally record an image of or sound from an agricultural operation. Do you think that's ambiguous because of the of?

MR. LIEBMAN: I think it's unambiguously content-based. If there's some dispute about whether of means something other than what the picture is of, then perhaps there is ambiguity there. But in my mind it's clearly

content-based on its face and there's not a need to resort to the legislative history but, nevertheless, if there's some ambiguity of whether it's merely at the facility or of particular operations of the facility, then it would help to consult the legislative history.

THE COURT: Is a photograph of an Australian sheep dog on the -- on an open field that's private property used for the production of livestock, is that within or without the statute? Is it content-based, the statute?

MR. LIEBMAN: I think that would be covered by the statute because that -- presumably a herding dog who is there as part of the operations of the facility. If you angle the viewfinder of the camera sightly and just took a picture of the sky, then you're no longer taking an image of the facility, and that wouldn't violate it.

THE COURT: And the skunk that wandered onto the field, you take a picture, that's within or without of the statute?

MR. LIEBMAN: Well, to figure out what the picture is of, whether it's of a skunk or a dog or a cow, the authorities would have to look at the image itself. And it may be that this casts a very broad net. There are certainly a lot of things that this statute prohibits, but a broad reach doesn't make it content-neutral. It just means it's still content-based but applicable to many different things that are

the agricultural operations.

THE COURT: If it's not content-based, then the Court looks to what, the evidence of discriminatory intent, or do we go to viewpoint next?

MR. LIEBMAN: Well, I mean viewpoint-based discrimination is -- has been described by the Court as an especially pernicious form of content-based discrimination. And I think it sort of depends. I mean we could -- we believe the entirety of the statute is viewpoint-based based on the legislative history and the desire to silence particular speakers, but it's viewpoint-based on its face as to subsection (c) because subsection (c) as an exemption for speech that's approved of or consented to by the owner. And so the only kind of speech that's permitted under the statute are ones that are approved of by the owner.

And the Court in Otter found a very similar provision to be viewpoint-based on its face. And so I think, you know, the viewpoint-based analysis proceeds in the same way that the content-based analysis proceeds, that is, it can be viewpoint-based on its face or viewpoint-based as evidenced by the legislative history.

And I can turn to that, although I do want to address the facial content-based status of subsection (b) as well, not just the provisions that prohibit taking an image of the facility but also the false pretenses provision.

And certainly to determine whether someone has gained access by false pretenses you would have to look at the content of the employment application or the content of what they told the interviewer at the job application and then lay those statements alongside the truth to assess whether or not there's some form of correspondence. And so in that sense that statute is also content-based on its face and certainly courts following Alvarez have adopted the strict scrutiny standard because prohibitions on false statements are by definition content-based because they distinguish between truth and falsity. So subsection (b) on its own is also content-based on its face, even if subsections (a), (c) and (d) are not.

Let me also just take sort of a step backwards. And I think Your Honor said that if you make the determination that these -- there's not a First Amendment right to record or to lie that we don't proceed any further. And I'm not sure that that's exactly true under R.A.V. versus St. Paul. In that case the Court was dealing with fighting words, which are not within the ambit of the First Amendment, but it still held that a content-based limitation on fighting words was unconstitutional.

So if we went this statute is content-based, even if otherwise recording is not prohibited or otherwise misrepresentations are not -- of this variety are not

protected, to limit otherwise unprotected speech in a content-based way nevertheless is unconstitutional. So I think the content-based discussion has to come up regardless of whether there's the threshold protection under the First Amendment.

I can turn to the legislative purpose component of --

THE COURT: I don't think I'm quite ready to leave your content-based argument. I think I sort of jumped in in the middle of your content-based argument, and I want to make sure I completely understand it. Part of it is I think you're distinguishing -- well, let me ask you I guess to describe in your own words your -- we've read your papers, but help me understand.

The fact that the statute might be directed to a specific subject matter -- let's read the statute in the way that you urge in your papers, the shot of the sky, that doesn't -- the shot of the cake, not helpful. But anything else on and relating to the agricultural operation tells us nothing about whether it has anything to do with how the animals are being treated, how the operation is -- whether it's good or bad, anything else, and you say content-based because it's subject matter, yes?

MR. LIEBMAN: Yes, that's right.

THE COURT: It's not a photograph of a hamburger. It's a photograph of a horse in a field on an operation. How

does that in your view make it content-based under the law?

MR. LIEBMAN: Well, the Supreme Court in McCullen says the test for whether or not something is content-based is whether the authorities have to look at the content of the speech to determine whether or not a violation has taken place. And you didn't have to do that in McCullen. Like I said, you could stand within the buffer zone and not say anything at all and still be in violation of the statute. As long as someone's lips were moving, they were violating the statute. Even if their lips weren't moving, they were violating the statute.

And this statute is different. It does require the authorities to pull up, you know, someone's recording and go frame by frame and analyze what the image is of to determine whether or not a violation has taken place.

And certainly the Supreme Court has made clear that prohibitions on speech of a subject matter are just as content-based as prohibitions on positions. So in Reed for example, this is the case where there were -- the municipality had a prohibition on signs, and the -- they took the position, well, we're not discriminating against any particular viewpoint. And the Court said, well, it doesn't really matter. Viewpoint discrimination is not the only thing that's impermissible under the First Amendment. You can't take certain topics and make them off limits. And that's exactly

what this statute does.

And it may be the case that someone who takes a picture of something that doesn't indict the agricultural industry, you know, their viewpoint is not discriminated against, but nevertheless by taking an entire class of topic, that is agricultural operations and what happens on them and putting it outside of the reach of the First Amendment makes this a content-based statute.

THE COURT: It doesn't really place it outside the context of the First Amendment, does it? It just implicates a different -- a more stringent review?

MR. LIEBMAN: That's right. So it might not take it outside of the First Amendment, but the question -- I think the best way to put it is that the First Amendment doesn't only prohibit viewpoint-based discrimination that silences partisans on one side, it also says we can't take entire classes of topics and regulate on that basis.

So for example a statute that says let's not talk about the Israel/Palestine conflict would be content-based even if it doesn't choose sides or a particular viewpoint within that debate.

THE COURT: And I think I understood your argument with respect to subsection (b). The fact that it's -- it only goes to misrepresentations means it's specific to one kind of speech, false speech as opposed to truthful speech, and so

that's content-based by definition also.

MR. LIEBMAN: That's right.

THE COURT: I think you were moving to legislative intent and discriminatory intent.

MR. LIEBMAN: That's right. So the Supreme Court as recently as Reed, which is two years ago, in a unanimous decision has given its approval to this approach where we're looking at a statute that might be content-neutral on its face but nevertheless has the purpose and motive of silencing speech.

And this -- the Supreme Court has acknowledged in at least five cases, this is Sorrell, Turner, Ward, Playboy and most recently Reed, which again was unanimous. So the Justices all agree that facially content-neutral statutes might still be content-based if their legislative justification and purpose is content-based or reflects a disagreement with the message put forth by the speakers.

THE COURT: And how -- I'll put to you the same question I put to Mr. Kaiser. And I'm not trying to be cute about it. I mean I just don't -- I genuinely don't understand how a trial court is to go about determining that given all of the information that is available in the legislative intent, the different viewpoints of legislators, the justifications offered post hoc by the State. How does the Court sort -- I know -- I've read the Supreme Court cases. I see how they do

it. I don't see how they're instructing me specifically to do it, or am I just missing it?

MR. LIEBMAN: Well, I think there are a couple of cases that shed some light on what the Court can and should consider. The first is the Arlington Heights case where the Court says that the legislative history may be highly relevant.

THE COURT: But how?

MR. LIEBMAN: Well, I mean there's no requirement that that motive be unanimous. I mean if you search through the legislative record and find statements as we have here that are clearly about silencing part of the debate, that's quite frankly enough.

THE COURT: No. But you're -- you're urging -- I'm in a coequal branch of government, and the plaintiffs in this case are urging me to strike down an action by another coequal branch of government, the legislative branch. They're the folks that are elected by the citizens of this State to enact policy, and there's a legislative and democratic process for that. If the citizenry is dissatisfied, if the citizens think this is a stupid law because it restricts my ability to get information about my food that I'm going to buy and eat and feed to my children and I'm dissatisfied, I can reach out to my legislators.

You're asking me as a judge to evaluate inconsistent

messages potentially from legislators as part of the legislative process, which is complicated, legislators taking into account numerous competing interests and policies, and then through that process settling on something that garners enough votes to pass. What do I do?

MR. LIEBMAN: We're not asking Your Honor to review the record for stupidity, as you put it.

THE COURT: No. I mean but you want me to strike it down as unconstitutional on the basis that the legislature intended some specific thing. And if they're competing messages --

MR. LIEBMAN: But that's the role of the judiciary going back to Marbury versus Madison. It's the role of the courts to review legislative enactments and to suss out impermissible motivations. I mean the reason we have the entire doctrine under the Equal Protection Clause and also this sort of impermissible or discriminatory intent is to protect against the tyranny of the majority.

When we have the government acting in illicit content-based ways that discriminate on the basis of belief or speech, then it very much is the role of the judiciary to step in and protect the fundamental rights that are enshrined in the First Amendment. And certainly the Court can do that, as the Supreme Court instructs in Arlington Heights, by looking to contemporaneous statements of the decision-making body.

THE COURT: So what do I do in the instance where six legislators are talking in the floor debate about the importance of state rights, three of them are talking about the availability of insurance coverage, four of them are talking about the safety of the workplace, three of them are angry about animal rights activists, two others are talking about the fourth grade class from whatever elementary school is there observing that day. What's the legislative intent?

MR. LIEBMAN: Well --

THE COURT: What's the purpose?

MR. LIEBMAN: -- Arlington Heights says we're looking for substantial motivations, and it's not precise language but it's something more than what one angry legislator said. And let me just say that the example you're giving is a much harder case than this one. Here we don't even have mixed motive. Really the only motive that comes out is animus against animal rights groups and a desire to stop their videos from being used as national propaganda. As you said, you can search the legislative history in vein for any reference to biosecurity, which is now the only real purpose that the State is putting forth.

THE COURT: Well, one of four.

MR. LIEBMAN: Well, I think they all sort of constellate around that same idea generally of worker safety, animal safety. But none of those interests come up in the

legislative history. The exclusive focus is on animal rights groups and what they use these investigations for.

And so here we're not even dealing with a mixed motive case. There's a predominant motive that comes out throughout. And I don't want to sort of exhaustively go through those quotations. We go through them in our brief. But it becomes very clear that the sponsors of the legislation, both in the House and in the Senate, are quite explicit, that the whole purpose of the statute is to stop national propaganda groups from recording embarrassing mistakes and using them to try to, as they put it, end animal agriculture in this country. And that quite clearly shows a disagreement with the underlying message that the speech conveys. And the Supreme Court has repeatedly said that that kind of motivation is impermissible and turns an otherwise content-neutral statute into one that's content-based.

Let me give another example of where the Supreme Court has sort of instructed how to -- how to wade through this, and that's the Church of the Lukumi case. And that's a free exercise clause but that's still within the First Amendment. And the Court essentially in that case refers to the free speech clause as a parallel provision. And in both cases the Court is trying to determine neutrality. Is this a statute that targets a particular content in the First Amendment in the free speech context or is this a statute that targets a

particular religion in the free exercise case?

And there the Court says that legislative purpose may be determined by both direct and circumstantial evidence, and that such evidence includes, quote, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body, end quote.

And that I think certainly permits Your Honor to consider, as you said, the fact that these -- this statute is part and parcel of a national effort by the meat industry to stop the outflow of undercover investigations that have drastically transformed public debate on matters of significant public concern.

And so given that framework for evaluating the legislative purpose, it wouldn't be out of place for this Court to look at the legislative history, to look at the context and to suss out what the true motivation was here, and that is to suppress and silence undercover videos and undercover investigators that have criticism of the meat industry.

THE COURT: Is that the same thing as saying to provide some level of protections for private owners in the industry? I mean you're illustrating and highlighting one

point. What if the purpose that floats to the surface is not to harm anybody specifically but to provide some protections for some industry in the state? Is that the same thing?

MR. LIEBMAN: I think in the context of this legislative history they're two sides of the same coin. What they're seeking to protect the farmers from is people who want to publicize their embarrassing mistakes, as the state puts it. And so I think it's inextricably intertwined -- the ostensible privacy protection is inextricably intertwined with the desire to suppress speech. And certainly looking at the context in which the statute is defended by its sponsors and others who come to speak in its defense, when they talk about protecting the privacy and property rights of farmers, what they're saying is, you know, these investigations are embarrassing and we don't want them to see the light of day.

So there may be cases in which there truly is a mixed motive, and in fact in the Church of the Lukumi case there was testimony from city council members and members of the public where the concern was about protecting animals who are used in sacrifices. Some of the statements were about just antagonistic discriminatory statements against practitioners of the Santeria religion.

So in that case you do still have a mixed motive where some people are concerned about the animals, some people just think animal sacrifice in the Santeria religion is immoral.

And nevertheless the Court says, well, even though there's that mixed motive there, that a substantial motivation is this discrimination against a religion because of its religious beliefs. That triggers strict scrutiny under the free exercise clause. And I don't see any reason that it would be different under the free speech clause. And certainly the Supreme Court in all the cases we cite says that that's the same analysis that should happen even for content-neutral statutes or facially content-neutral statutes.

I think with regard to the content-based status of the statute, that's -- those are all the points I wanted to make, Your Honor.

THE COURT: While it's on my mind, and I really don't want to spend much time on it, but I think actually the discussion we've just had maybe answers the same question I put to Mr. Kaiser, that is about animus -- well, what do you say about that, if we reach the equal protection analysis?

MR. LIEBMAN: I think Moreno is very clear on that point under the equal protection inquiry. You know, in that case there were one or two stray comments about hippy communes, and that alone was enough to invalidate the law under the animus doctrine. Here we have a record that is much more prevalent with animus than in that case. And I think Moreno and Windsor both make clear that the Court can -- and Cleburne as well, all make clear that the Court can and in

fact does consult the legislative history to evaluate whether or not animus is present, and in doing so don't require a ton in terms of quantity of animus to strike down a statute or at least subject it to heightened rational basis review.

THE COURT: Is that something for a district court judge to do or is that something for the Supreme Court to take account of? I mean that's an earnest question. I know it's outside the context of the case law, but I'm a trial court. I'm going to look at a couple comments by a few state legislators and decide it's evidence of state animus against animal rights organizations, and on that basis I'm going to invoke the authority of the federal judiciary to strike down as unconstitutional an action by our elected representatives in this state? That's what you're urging, right?

MR. LIEBMAN: I think so, Your Honor. And again it goes back to the role of the judiciary to check the tyranny of the majority against unpopular political groups, and that's exactly what happened in this case.

THE COURT: And I understand that the appellate rights of the parties are available on both sides, but is that really -- I really struggle with whether that's an appropriate exercise of authority for a district court judge. I mean it's in the cases. I read it in the cases. I don't know how to apply it. I see the Supreme Court can do it. It raises a serious question in my mind about the proper function of the

judiciary and at what level. I'm not a policymaking body. I'm just talking out loud now. It's really something that gives me pause.

MR. LIEBMAN: I can sympathize with that. I think, you know, it's the role of the district court to apply as best as possible the precedent that's come down from the higher courts, and the higher courts through the animus quadrilogy has said here is how you do it. It might not be precise, but you do your best to apply it, and if you get it wrong, then there's the courts of appeals to fix it. But I don't think what we're asking for would demand policymaking at the trial court level.

THE COURT: That's an imprecise reference. I mean I guess I just view my role -- it is different than the -- but you've stated it correctly. My obligation is to apply the law as best I can understand it from the courts above. All right, thank you.

Let's turn -- we have a little more work still to do, but let's -- I don't know that I need much argument about strict scrutiny beyond what you've said in your papers. I think I'd like to turn for a moment to intermediate scrutiny in the event that the Court decides that that's the level of scrutiny that applies to this statute.

Mr. Kaiser, I think -- I think -- let me state it more generally and then invite you to illuminate the issue for me.

In somewhere around 600 pages of briefing I think the State devotes a grand total of about four pages to arguing how this statute is narrowly tailored to the significant governmental interests that are identified. There's about three and a half pages in the State's memorandum in support of its motion for summary judgment and one paragraph in its reply memorandum. And to me this seems like sort of where the rubber meets the road on intermediate scrutiny.

It is not clear to me from the briefing how the restrictions in the statute relate at all to the four governmental interests identified in the paper, let alone how they're narrowly tailored to further and advance those interests.

The statute on its face -- and I'm summarizing now, and I understand the devil is often in the details in the careful work that we do in this courtroom. But the statute says don't lie to get access to the property, don't record stuff surreptitiously, don't record stuff while you're trespassing, and don't record stuff without the permission of the landowner.

And on the other hand what you're talking about is avian flu, biosecurity outbreaks, health and safety of employees when others are distracted in the workplace, and the like. I mean it seemed to me that this was a powerful statement and simply put by the plaintiffs, and I want to bring it directly

to your attention and invite your response because I want to ensure I'm giving full weight to the State's position.

When the plaintiff said -- this is on page 25 of docket number 171. I think this is the plaintiffs' opposition to the State's motion for summary judgment. They say the law criminalizes even the most cautious and diligent undercover employee and is thus overinclusive, and at the same time the law does not criminalize careless violations of security or food safety rules by non-investigators, thus rendering it grossly underinclusive, as the law relates at least to the four governmental interests identified. That seemed correct to me. Why is it wrong?

MR. KAISER: Well, we have to start with the standard, which of course recognizes that the law doesn't need to be perfectly tailored, and it doesn't even need to be -- it's certainly not the least restrictive and not perfectly narrowly tailored. And the harms that have been articulated by our experts that we've -- that we've talked about are about people who the owner doesn't know, are doing activities that they don't know about, or have gotten there in a surreptitious manner, and that's dangerous.

We have a number -- the statistics are mind-boggling about the number of hens that had to be destroyed because of a avian influenza and porcine diarrhea virus. And the fact that the federal government has suggested that for owners of birds

to be reimbursed if they -- if their flocks are destroyed, they have to have a biosecurity measure. Certainly subsection (b) goes exactly to that. Who are these people and where have they been?

THE COURT: No, no. This is where I think you may have lost me. I mean I think that the governmental interests that the state puts forward, many, maybe all of them, are significant interests. I don't -- I doubt if there's anyone in this courtroom that disagrees that there's an important governmental interest in protecting against animal exposure to infectious disease by controlling human movements. How is that related in any way to the statute's prohibition on gaining access through misrepresentation, unless that misrepresentation is disguised to conceal an intent to harm the food supply for example or something?

MR. KAISER: Well, for example as the -- one of the amici noted, there is -- in general biosecurity protocols there's a three day quarantine period if a -- if a person has had contact with other avian species.

THE COURT: That question is not asked to anybody that wants to access the facility though, is it, at least not under the statute? The statute isn't drawn to determining whether anyone seeks access to a facility who has been previously in contact with another facility or anything. There's nothing about the misrepresentation that would

implicate paragraph B of the statute that is tethered in any way to any of the safety risks that are identified in the papers. It could be as simple as a misrepresentation that I'm legally -- I'm lawfully in the United States.

MR. KAISER: It could be.

THE COURT: It could be I'm an assistant scout leader with the Boy Scout troop that's here for the tour. It could be -- it could be anything.

MR. KAISER: It could be.

THE COURT: How is that prong narrowly tailored --

MR. KAISER: Well --

The Court: -- to prevent the spread of disease among the food source?

MR. KAISER: It also could be I'm not a member of an animal rights organization who has been on four farms in the last 48 hours. And when we're considering the purposes -- when we're considering the types of regulation here, the types of misrepresentation, Ward says that narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. Well, would it be more likely that humans would be moving through farms or processing facilities deceptively absent the regulation? Absolutely.

THE COURT: Let me ask you this. Where is the evidence that any member of an animal rights organization has

caused any of these foodborne illness outbreaks that are the subject of the biosecurity concern?

MR. KAISER: Well, to be honest, Your Honor, we don't have that evidence.

THE COURT: Right.

MR. KAISER: And part of that is because it's been very difficult to get farmers to stand up for this law because of perceived threats of retaliation by plaintiffs or folks like them.

THE COURT: So the State's position is that if a person makes a misrepresentation to a owner of a company, an agricultural company, that person presents a biosecurity risk?

MR. KAISER: That person may present a biosecurity risk.

THE COURT: Could the State take any further action that's more narrowly designed to determine whether such a person would present such a risk?

MR. KAISER: Yes.

THE COURT: All right. It's not required, of course, to have the least restrictive means --

MR. KAISER: That's right.

The Court: -- or the least intrusive means, but it has to be narrowly tailored. That has to mean something beyond just that there's a hypothetical possibility, does it? I mean subsection (b) may present a perfect illustration of

this in light of the case law. It is a blanket statement about criminalizing conduct. Let's assume for purposes of this discussion that it's First Amendment protected conduct. Let's assume for purposes of this discussion that it's content-based so we're applying the -- we're applying the intermediate scrutiny in reviewing the statute.

MR. KAISER: Content-neutral.

THE COURT: Content-neutral. I'm sorry, content-neutral, so we're applying intermediate scrutiny. The risk is the spread of biohazards in the food source. The thing that's prohibited is a First Amendment statement that's untrue. That's the best the State could do? You don't have to do the best, but that's something that's restricted and narrowly tailored to that risk that's presented in some fashion?

MR. KAISER: Well, the standards require that the restriction be reasonably but not perfectly targeted to address the harm intended to be regulated. And remember the harms here are the four that we've articulated in privacy and private property, and these -- and what does the restriction do? The restriction keeps people off of land that is biosecure, that has dangerous animals, that has dangerous perhaps processing facilities.

THE COURT: That's not true. It keeps liars off the land maybe.

MR. KAISER: Right.

THE COURT: That's all it does.

MR. KAISER: That's what it does. But inherent in those misrepresentations are that the landowner doesn't know who those people are. And that's what's important, because if you say I'm a journalist, the landowner can say, oh, have you done 15 interviews at other farms? Oh, yeah. Well, maybe we shouldn't go into the barns but, you know, you can interview me in my house. If the person says -- is actually a competitor and he says, no, I'm just looking for a job, we don't know where that person has been and what exposures those folks have had. If the person says I'm a part of the Boy Scout troop and in fact they're hired by an organization like plaintiffs, the risk is higher. And certainly that meets the standard. The regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

And I will concede that our record does not show that plaintiffs' undercover operatives have created any of the diseases that we risk, or that plaintiffs' undercover operatives have caused an injury to another worker. Though there is certainly some evidence in the record of plaintiffs' undercover operatives perhaps prolonging suffering of animals by not reporting abuse in a timely manner. And that's -- that's the evidence that we have for Your Honor and it's -- we

think it's sufficient.

THE COURT: And subsection (b) is a good example, the misrepresentation prong. That protects against human exposure to zoonotic disease and contamination?

MR. KAISER: Yes.

THE COURT: How?

MR. KAISER: Well, for the reasons that I just articulated. Because the statement -- someone is making a false statement to get access to an animal agricultural operation is misrepresenting that person's identity and not allowing the owner or the operator to know where that person has been.

THE COURT: So one of the principal arguments that the State advances on the manner in which -- well, I guess it's a -- let's see. This is the argument about how the act is narrowly tailored to the significant governmental interests. You complain that animal rights activists don't appear to be offered training on biosecurity to their investigators. Those are the same investigators that are seeking employment that then receive the same training from the employer that all the other employees receive, no?

MR. KAISER: That's right.

THE COURT: So is it a -- so how is that harm not mitigated?

MR. KAISER: It's mitigated to some extent, Your

Honor, but the nature of the undercover investigator's investigations is different from -- from a guy just seeking employment. The guy who is just seeking employment is coming in and saying I want a job, and the owners, the farm owners or the processing owners are going to say, well, this is an aviary. Have you been hunting in the past three days? Well, yeah. Okay. Well, come back on Thursday. The undercover investigators aren't going to say things like that.

THE COURT: Why do you think that's the case? I mean --

MR. KAISER: Because it would disclose their work as undercover investigators. Yeah, I've been at three farms in the past 24 hours looking for a job.

THE COURT: And the suggestion in the papers, in the Government's -- or in the State's response that the undercover investigators pose some threat to animal safety -- I'm not an expert. I understand that's not my role, but it's counterintuitive to me that the animal rights activists who seek to improve the well-being of animals would intentionally expose animals to risks of -- biosecurity risks or others that have wiped out tens of thousands or hundreds of thousands of animals.

MR. KAISER: Well, animals rights activists who want to secure the rights of animals have released thousands of mink knowing that mink that are in captivity can't live out in

the world, but yet they do it because of a political statement.

And there's evidence in the record that PETA has delayed production of animal rights -- of videos showing harm because it's more effective for their speech. And maybe in the greater good that means we'll stop producing animals for food, but those animals have more suffering in that short-term.

THE COURT: Well, is it the State's interest to promote the supervision of the conditions in which the animals are kept on these farms and to make that information more readily available to -- I mean part of the State's argument here is that we're seeking to reduce harm to animals. That's what I understood you were to be arguing at least in part. So do we need more information about how the animals are kept and how they're treated in the facilities --

MR. KAISER: I don't --

THE COURT: -- or less?

MR. KAISER: I don't think we need more information. The harm to animals is largely of their exposure to zoonotic diseases. It's also their exposure to folks who have divided loyalties and, you know, might not be slaughtering that animal properly to get a video, might not be reporting quickly someone who is violating the law and committing an act of animal abuse.

THE COURT: Acts of animal abuse are covered

elsewhere in the statute, aren't they?

MR. KAISER: In criminal law, yes.

THE COURT: There's criminal prohibitions against those things --

MR. KAISER: Yes.

THE COURT: -- if that's what we're concerned about. Is the statute necessary or helpful to advance those causes?

MR. KAISER: Is the statute necessary to advance those causes?

THE COURT: Or helpful?

MR. KAISER: Well, I think it's helpful.

THE COURT: It gives a second count in a criminal information I guess for somebody who engages in animal abuse?

MR. KAISER: Yes.

The Court: The State makes the statement in support of its second identified interest protecting against harm to animals caused by unqualified or inattentive workers by saying, and then you put this in quotes, a person entering an animal agricultural facility to surreptitiously record, quote, likely does not have the best interests of the individual animal in mind, end quote.

MR. KAISER: That's right.

THE COURT: Is this what we're down to to support the justification for the State's interest is what's -- what's the intent of the person, the hypothetical person, who may be

present and if your expert is hypothesizing about whether such a person would have the best interests of the animals in mind? That's the State's justification for how the statute is narrowly tailored to the significant interest?

MR. KAISER: Yes, Your Honor, and we think it meets the statute's or the test articulation, whether without the statute the government's interest wouldn't be as well served.

THE COURT: I wondered whether the fourth interest, the one about harm to facility employees caused by inattentive workers -- this was just an example. And I think this is what the courts are cautioned not to do, so let me do it, but just by way of illustration. The concern I think that's articulated by the State is if you've got someone who is interest -- there who is interested in recording what's happening, they may not be paying attention to what's happening, and these are dangerous places where people could get harmed.

MR. KAISER: That's right.

THE COURT: The statute doesn't purport to prevent anybody from checking their e-mail or playing games on their phone or texting or making phone calls or doing anything else that employees might do that would distract, just recording.

MR. KAISER: That's right.

THE COURT: And it's irrelevant, right, because if

the one thing that the State identifies could help advance the purpose of the statute, then that's enough.

MR. KAISER: That's right, and particularly when that's the understood harm that that statute seeks to -- seeks to prevent.

THE COURT: Right. The understood harm drawn from what experience? We point to what evidence in the record that animal rights activists have caused harm to coworkers through inattentiveness because of recording?

MR. KAISER: Well, I will also concede that there is no evidence in the record that animal rights activists have caused this harm. Our experts who worked in the food safety inspection service, worked for the FDA, have worked as consulting for animal welfare on the industry side have articulated this is a serious concern that they would have based upon their experience in particularly processing facilities.

THE COURT: Two questions related to that I think. Do you agree with -- am I correct -- I went searching for evidence that the State supplied that there is any documented incident of animal rights activists or anyone else causing any of these harms that are identified by the State by recording surreptitiously in any of these facilities? I didn't see that evidence. There is none in this record; is that true?

MR. KAISER: That's true, there's none in this

record.

THE COURT: It's not a requirement, of course, but I wanted to ensure I hadn't missed it.

MR. KAISER: Yes.

THE COURT: And I think the State's argument is these are -- these are nevertheless things that our experts hired to review the statute after the fact say could be concerns that might arise and this statute would help alleviate them.

MR. KAISER: They are concerns that would arise. And I should -- I should qualify that with the statement that there is evidence in the record that for example sometimes undercover animal rights activists delay their findings to increase their public impact even if that means waiting for particular animals to be harmed repeatedly during the process.

Now, that's not happened in Utah and there's no evidence that these particular plaintiffs, any undercover agent of these particular plaintiffs, has engaged in that, other than some evidence that PETA has delayed reporting some of the -- their -- some of their undercover investigations to law enforcement.

THE COURT: I don't know. Mr. Liebman might tell me -- more likely he won't -- but ALDF or PETA might say today, yeah, if this statute is invalidated and we can place investigators there and they begin to acquire this

information, we absolutely will continue to acquire information rather than immediately report because that's the most instrumental way to make the case that we're trying to make.

And the State's argument I think is, but if you allow any of the harm to go unaddressed, that you're actually causing further harm and that's what we intend to stop, except that we don't want anyone there documenting it. We want to make it illegal for anyone to record it, but if anybody sees it, they're required to report it.

MR. KAISER: Not anyone. The statute of course related to recording is very, very narrow and targeted to folks who intend to only record -- well, not only -- but intend to record in opposition to the property owner's prohibition and then do record. That doesn't include employees who say, oh, my goodness, I can't believe John just did that. I've got to report this, and no one will believe me if I don't have a picture of it. And so the statute is more narrowly tailored than just a prohibition on recording, at least for those -- for that specific harm.

THE COURT: I have some questions about overbreadth but I think they're best put probably to the plaintiffs. Let me ask you, Mr. Kaiser, before I invite you to switch out spots at the podium, what have I missed with respect to the narrow tailoring? The State has made its arguments on pages

14 to 19 of its brief and then again in its reply. Is there more to add besides what we've talked about here?

MR. KAISER: Your Honor, only that these -- this sort of evidence can be considered by the Court and can be balanced by the Court. I have a really long quote from Clark versus Community of Creative Non-violence. That's the sleeping in the park case. And the plaintiffs there wanted to get a homeless tent city right to protest, and the Court said, well, that's not protected, but even if it is, it's not for -- up to us to decide how many hours they should be there, how much camping there should be there. That it's the -- it's the Park Service's determination. We do not believe that time, place and manner designations assign to the judiciary the authority to replace the Park Service as manager of the nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

And so while the Court can consider these and must consider the requirements under Ward, and even iMatter, whether the restriction reasonably targets the -- to address the harm intended to be regulated and is satisfied if the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation, it's not strict scrutiny and it's not least restrictive means.

The Court: The State's interests -- let me think.

I think sometime this morning I thought I finally had this question well framed in my mind and now I've forgotten how I stated it, but in short I've wondered whether the State's proferred justifications prove too much. If the question is for example to prevent distracted workers, that's justification for nearly any restraint that the State would seek to place on employees in their workplace, including I guess unprotected speech that employees might otherwise enjoy in the workplace. When wouldn't that be a justification then? I mean it seems like then we'd be just rubber stamping any restriction.

MR. KAISER: Well, remember that we have to consider this in the context of this law, in the context of these particular facilities. We're not just talking about employee distractions back in my office. We're talking about employee distractions in either a farm where there are -- where there's serious risk from the -- from injury, from animal injury, or from a animal processing facility where there's -- it's one of the most dangerous occupations in the country.

So, yes, in general would that -- would that interest be suspect? Perhaps. I mean if we were talking about a prohibition on recording in -- in your chambers, although we'd have different justifications for a prohibition on recording in your chambers, but we've got to consider it in the context here of the facilities to be regulated.

THE COURT: Thank you, Mr. Kaiser.

Mr. Liebman, I'd like to get to those issues. Before I do, can you help us understand better how the plaintiffs view overbreadth relating to these other doctrinal issues? Where in the Court's analysis does that overbreadth analysis fit?

MR. LIEBMAN: I think the simplest way to frame it -- I don't think it's especially significant. If the Court finds essentially that the arguments that we've made about why the statute is content-based and fails strict scrutiny, overbreadth doesn't matter; if it's content-neutral and it fails intermediate scrutiny, overbreadth doesn't matter. It really comes in if the Court is convinced that there might be constitutional applications of the statute, there might be some permissible restraints on misrepresentations or recording but the statute bans too much.

The Court: Too much, right.

MR. LIEBMAN: So I don't think there's really a need to go over a separate claim or cause of action.

The Court: We get to that in your view after the Court considers whether there's First Amendment rights implicated, makes a determination about the level of scrutiny to apply, goes through all of that, and then if there's something remaining, then we would consider it through the lens of overbreadth I guess before we get to the equal protection analysis?

MR. LIEBMAN: Yes.

THE COURT: And I guess a related question that we wanted to put to all of you today, I'm not sure I still can see a meaningful application of the overbreadth analysis -- or excuse me -- the equal protection analysis here. I understand Dean Chemerinsky is urging this and Judge Winmill went in this direction. There's a fundamental right potentially at issue here, but it's a First Amendment right. We have a doctrinal way to evaluate that right. What sense does it make -- I mean if there is a protected First Amendment right, we'll be taking it up in the context of the First Amendment analysis, and if there's not, then I'm not sure I see how the equal protection analysis is really going to be very helpful to us here.

MR. LIEBMAN: I think you're right. I don't think it does independent work. If the statute violates the First Amendment, it also violates the Fourteenth Amendment under the fundamental rights analysis. But the inverse is true. If we don't win under the First Amendment, we don't win under the fundamental rights analysis.

THE COURT: Okay. That was how I was conceiving of it. I wasn't sure if I misunderstood your position based on your papers.

Let's talk about intermediate scrutiny, should we?

MR. LIEBMAN: Yes.

THE COURT: The State's -- the State's correct. I

mean Mr. Kaiser pointed to the correct standard, right? And I sometimes say this in court. My law clerks ordinarily become very alarmed when they show up to work on their first day, and I explain -- there's any number of reasons for that, but what seems to catch them off guard is I tell them that they'll be required to get two tattoos, one on each arm, one that says standards and one that says burdens, because my work is focused like a laser on those things. That's what drives the work of a trial court in my judgment. What is the standard that I'm required to apply, and who before me carries the burden? I think Mr. Kaiser has correctly identified the intermediate scrutiny standard, has he? No?

MR. LIEBMAN: I don't think so, Your Honor.

THE COURT: Okay. How so?

MR. LIEBMAN: Well, I think the way it's been explained here sort of degrades it to something like rational basis review where post hoc justifications are all that matter, that conceivable, you know, bare assertions of harms are adequate, and that's simply not the test.

THE COURT: No. It needs to be more than that, right? But neither need it be the least restrictive or least intrusive means, but it need not be -- and it's not left to me to determine whether there's a better way to do it. The question is does it -- now I've misplaced the specific language, but I thought he was citing it correctly. Does it

advance -- does it advance the governmental interest? Does it materially aid it? Is that too general?

MR. LIEBMAN: I think it's too general and too generous. I think the Court has in many ways narrowed that assessment under Ward in the McCullen case, and this is at page 2535 of McCullen where the Court says that under intermediate scrutiny the restraint must not burden substantially more speech than is necessary to further the government's legitimate interests. And also that the government, even though it need not be the least restrictive means, may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

And here where we're talking about restraints on lies regardless of what's lied about, where we're talking about recording regardless of whether or not it's distracting, or lies regardless of whether or not someone has been on a farm in the last three days, and there's nothing in the record that says that investigations are that fast and furious, in each of those cases a substantial portion of the burden on speech does not serve to advance the goals and the statute would fail intermediate scrutiny.

So I think the articulation of the intermediate scrutiny test in McCullen, which is the Supreme Court's most recent analysis of it, is more demanding than the way the State has

framed it.

And certainly, you know, even in McCullen, a buffer zone would in some ways advance the interest in preventing traffic congestion or sidewalk congestion, but intermediate scrutiny nevertheless demands more, that there be not the least restrictive means, but that the burden not disproportionately affect speech rights in ways that don't even advance the government's interest, and that's exactly what we have here.

THE COURT: Help us apply the second part. You're reading from paragraph numbered 18 from the McCullen decision. The second part of that you recited where the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. How does that relate in the context of this regulation do you think?

MR. LIEBMAN: Well, this prohibits misrepresentations regardless of what is misrepresented. And the State has articulated these, you know, four just generally call them safety rationales. And I think it's important that we can get to that in a moment that those aren't -- shouldn't even be considered by the Court, but we can bracket that for a moment.

But the regulation on misrepresentations, regardless of what's lied about, burdens speech that doesn't even advance the interests and safety. So for example if we have a

misrepresentation that simply says, you know, I don't work for an animal rights group, that doesn't implicate the stated concern about someone who has been on another farm and might be a disease vector.

In the same sense that recording, that done by a diligent employee, and I think the portion of our brief that Your Honor read to Mr. Kaiser is informative on that, that the most diligent undercover investigator who wears the button-cam that otherwise forgets it's there, does his job, is not distracted, that the burden on that individual's speech doesn't advance the government's interest in this constellation of safety concerns. That I think is the reason that this statute fails intermediate scrutiny.

THE COURT: Plaintiffs take the position in their papers, and you just stated it, that we don't even reach these proffered government objectives. I think your -- as I recall, the argument was where the State has invoked the legislative privilege on the one hand, it can't then simultaneously purport to offer justifications. Is that the argument, relying on the Nebraska District Court decision?

MR. LIEBMAN: That's part of it. And there's another case, Awad versus Ziriax, a Tenth Circuit case from 2012. It's an Oklahoma Sharia law case where the Court says that it cannot and will not uphold a statute that abridges an enumerated constitutional right on the basis of a factitious

governmental interest found nowhere but in the defendants' litigating papers.

That's exactly what we have here is post hoc rationales that the State has come up with to defend the statute after the fact, and those shouldn't be considered. The only compelling or the only significant interest that actually animates the discussion through the legislative history again is the desire to suppress the speech of animal rights advocates, which not only isn't significant, it's not even legitimate.

And so I think the Court ought to focus only on the actual motivation for the statute in assessing the purported interests here.

THE COURT: That's what I thought I understood you to say in your papers, and that's what I hoped I hadn't read. What do we do about that? I touched on this. I think Mr. Kaiser was at the podium. On the one hand this only -- this issue only arises in the context of government action where we have a party come into court after the fact and purport to offer an explanation for something, and then ordinarily doesn't make anybody available who is related to that decision to explain it, and instead turns to other people.

We would never -- I don't want to speak too broadly. We ordinarily wouldn't allow a corporation to come in and say,

well, we took this act for this reason, but we're not going to make anybody available to testify about it. We would never allow it. We wouldn't allow anyone to testify about that. But government is different, and government action and legislation is different, right, for reasons that we've talked about.

We don't want legislators sitting in courtrooms under oath talking about the justifications or rationales for legislation, do we? Does a legislator sit for a deposition in this -- how many legislators? And do they testify about their intention or do they speak -- is there a Rule 30(b)(6) designee for the legislature who comes in to talk about the intent and purpose for the legislature?

MR. LIEBMAN: Well, I think Your Honor is right that that's their choice and the legislative privilege shields them from doing that. But it can be, you know, in the case where the legislature refuses to put forward its legitimate motives after the fact, then we use what we have, and what we have is the legislative history that's contemporaneous with the decision-making body, which as we've discussed earlier, Arlington Heights makes clear is a way to suss out what the motive was for a statute. And I think that applies just as much when we're looking at what interest motivated the legislature for the tailoring or the application of scrutiny as it does for the reasons we discussed earlier.

THE COURT: So a little old judge like me after the fact reviews printed transcripts of floor statements and committee hearings, and I divine what the legislative intent was somehow by extracting from all of the varied statements by the varied people what the legislative intent is and say to the legislature because you didn't agree to sit for deposition under oath, you can't respond, and that's it. And then we move forward and we determine whether what I've come up with is sufficient or not. We don't allow the State to come in and make an offer or an explanation for a State purpose?

MR. LIEBMAN: Not after the fact. And that's exactly the reason that we have the tiers of scrutiny is to prevent the government from acting in one way that shows an illicit discriminatory motive and then after the fact coming in with post hoc rationalizations that obscure that fact.

THE COURT: Am I right that there's not a Supreme Court case where the Supreme Court has said the State offers justifications A, B, C. We decline to consider them because the State legislators invoked their legislative privilege?

MR. LIEBMAN: Not because of the legislative privilege other than that case that we cite in the footnote about the legislative privilege. But there's certainly cases where the Court is trying to determine the actual motive or the purpose and the interest that motivated the passage of a statute. That's Lukumi. That's Arlington Heights. And, you

know, the idea that that might be imprecise is acknowledged in those cases, but nevertheless it prevents post hoc rationalizations that obscure more invidious forms of discrimination.

If the rule were otherwise, you know, the deliberative body could say all sorts of horrible things and, you know, say this is for this purpose, but don't worry, when we get hailed into court, we'll come up with some other reasons. And that I think would truly defeat the purpose of the tiers of scrutiny that really try to suss out the link between the actual motivations of the statute and the extent to which the statute is narrowly tailored to those ends.

THE COURT: You told me you mentioned this is in a footnote. I'll just -- I thought I read every footnote. I don't remember. Do you know what footnote you have in mind?

MR. LIEBMAN: I don't. Were you asking about the legislative purpose? And I think that's the District of Nevada case about if they use it as a shield, they can't use it as a sword.

The Court: I was asking -- it's Nebraska. Is it Nebraska? In any event, I was asking if there's a -- I don't see a Supreme Court case where the Supreme Court has said, well, we're not going to consider the proferred justifications because the state legislature invoked the legislative privilege. Did I miss one?

MR. LIEBMAN: Not that I know of, but I think that's because that so rarely happens. I mean the government in most cases is pretty straightforward about what it's motivations were. And certainly the Awad versus Ziriax case, the Tenth Circuit case, does say these sort of after-the-fact, you know, ingenious interests that are found nowhere but in the Defendant's litigating papers are not to be considered where we're talking about the abridgement of constitutional rights.

And so that case I think, it's not the Supreme Court but's it's this circuit making clear that those interests shouldn't be considered. But of course if Your Honor does consider them, we would certainly argue that the statute is not in any way narrowly tailored to those interests.

THE COURT: You set out those arguments in your papers.

MR. LIEBMAN: Right. Let me just make one more point on that. And I think the McCullen case is again pretty instructive. You know, a statute is not narrowly tailored where there are preexisting generally applicable civil and criminal laws that directly address the purported interests. And the same applies here. They could have a general -- generally applicable animal cruelty law that prohibits treating animals cruelly. They could have -- do have generally applicable torts that address all of the interests they just discussed. There's rules against poisoning the food

system, and on and on. And so --

THE COURT: Trespass.

MR. LIEBMAN: Trespass. And of course the rights of employers to fire any employee for any reason if they're distracted or not, all of that are generally applicable, content-neutral nonspeech restraining ways of directly addressing the speech at issue.

And, you know, this idea that the public and workers and the animals will somehow be better off if there's no whistleblowing in this industry is, with all due respect to the State, Orwellian. I means these are investigations that promote all of the interests that the State now purports to defend. Now, the statute is not only poorly tailored to those interests, it's actually antithetical to those interests.

What it's perfectly tailored to is silencing animal rights advocates by targeting the two methods that they use to conduct these undercover investigations, which is gaining access through false pretenses and recording videos. And so, you know, the sort of contortions to make this statute about these interests, you know, when in fact the statute is perfectly tailored to silencing critics of animal agriculture I think really shows that the statute fails under intermediate scrutiny.

THE COURT: Thank you, Mr. Liebman.

Mr. Kaiser, I did want to ask you about -- I think you

had some additional comments, but I wanted to ask you about a point that Mr. Liebman touched on and I forgot in your argument.

The State says in its papers, if I understand it correctly, the very same conduct that's prohibited by the statute is okay if it's done by a whistleblower, but it's not okay if it's done by somebody who, with the intent to go blow the whistle, seeks out and obtains employment or goes on the property. What's the implication of that argument for the intermediate scrutiny analysis?

MR. KAISER: It's that the statute is not punishing more speech than is necessary to effectuate the goals of the legislature. It's allowing legitimate reports of whistleblowing.

THE COURT: Well, are whistleblowers who are recording in the workplace presenting the very same harm, the risk of inattentiveness and physical injury, and injury to the animals, harm to the animals, that you've just told me that the statute is designed to prevent?

MR. KAISER: No, because those folks didn't come into the job with the intent to do these recordings. They responded to a situation that they saw, which gives them a different perspective, a different experience and competency that's different from someone whose only idea is to come in and -- come in and record and get out.

The Court: On what basis do we know that?

MR. KAISER: I think it's logic and common sense. If the Court -- do you have more questions?

THE COURT: Just one more on that, and then I'd like to hear any final comments you may have. But from 10,000 feet now, if we step back for a moment, what sense does it make that in the State's view it is not only lawful but maybe laudable to have whistleblowers as a matter of state policy who observe wrongdoing in a workplace, including in an agricultural facility, who engage in this conduct with the intent and purpose to bring it to light, but that someone who seeks to do the same thing but starts one step behind is convicted of a misdemeanor?

When I say starts one step behind, the same intent formed at a different point in time in the employment relationship, but someone who goes to work in an agricultural facility to support their family and two weeks in says, oh, my, I had no idea. This is awful. I've got to alert somebody about it. And somebody who two weeks earlier is making application believing that the very same conduct is happening, maybe having been told about it, who goes and seeks that employment for the very same -- now the same purpose that the employee has two weeks later to blow the whistle and bring it to light. One is charged with a crime and the other is lauded under the statute, the whistleblower statute. What sense does that

make?

MR. KAISER: Well, it makes sense, Your Honor, in the idea that the legislature did not want to -- animal safety is a concern of the legislature, and the legislature determined that -- that they didn't want to prohibit employees who had an ongoing relationship at the facility from reporting criminal activity. But someone who is engaged -- who is coming in to spy, right, certainly some of those people might have heard that there's some -- there's some illegal activity, but there are also people who are coming in to record legal activity that they wouldn't otherwise have access to.

There are some people who are coming in to record business activity that they want for a competitor. Maybe there's a journalist on one side of the issue or the other who is engaging in employment-based surreptitious recording. And the legislature determined that those folks pose the risks not only to safety and security but also to privacy.

I mean if we want to talk about the issues and justifications that the legislature considered, the words private or privacy were used 45 times in the very short record of the debates in the committee hearings that we have. And someone who is coming in to record for the purpose of recording is someone who is coming in for the purpose of invading that privacy and private space. Someone who is recording based upon reactive, not proactive but reactive to a

situation that they encounter, is -- is blowing the whistle on illegal activity, and that's a differentiation that the legislature could -- can make.

THE COURT: You came to the podium though with some notes. You wanted to make some comments in light of Mr. Liebman's comments.

MR. KAISER: I did. I think that the citation that -- the proposition that the legislators seeking immunity and then having the whole state being precluded from asserting justifications for a law is not based in any law I'm aware of. I admit I'm not sure I'm familiar with the Tenth Circuit case that they cited, but what was in their brief is this either Nebraska or Nevada case.

And what happened in that case was that a legislator asserted immunity and then wanted to file a brief about what his view of the -- of the legislation was, the purpose of the legislation. And the Court said, no, no, no, you can't -- you can't do that.

Well, that's very, very different from the State asserting bases. And if the plaintiffs want to call in a legislator and ask about what the purpose of the law is, that's the same after-the-fact rationalizations that they're criticizing the State for doing now.

And the plaintiffs keep saying, Mr. Liebman keeps saying, that the avowed purpose of this law was to silence animal

rights activists. Well, you start reading the transcripts, to the extent that the Court cares, and representatives repeatedly say this is a privacy and safety -- well, this is a privacy and private property issue, and more than once also talk about food safety and animal safety.

Now, I'll admit that's -- those are sporadic references in the record, but they're not absent. And this wasn't a case of the hypothetical that you were mentioning about three hours ago of a legislator -- legislature talking only about hating on a particular group. There was certainly a lot of discussion of privacy, private property, ability to control property, the necessity to control animal operations, and the concern about family farms that exist in the state, which are, you know, 95 percent of animal agricultural operations in Utah.

THE COURT: We have the legislative history, and I'm actually not -- I'm not convinced actually that we've read the Senate -- there was a Senate committee hearing. I think that that transcript was submitted, and I don't think we got to that. But we've reviewed a lot of it and it speaks for itself.

I do want to say this though in response to what you said. I want this to be clear today. I'm invoking in this -- and we had a discussion earlier about this. It's the Court's standard practice in every case. It's a matter of fairness

and application of the rules. We're not going to expand today the State justifications for the statute in terms of our legal analysis. The dispositive motion deadline was set for a purpose. The parties both filed cross-motions for summary judgment and oppositions and set forth their positions in the papers. The word privacy appears once in the reply at the end of a clause I think is my recollection in the section of the brief relating to the -- whether the -- what's the intermediate scrutiny analysis?

And the reason this is important -- I do this in every case. We don't come to oral argument and present a new issue about which the other side didn't have notice in advance so it could be adequately briefed. I understand and appreciate what you're saying about what's the motivating purpose behind the law, and certainly I'll have that in mind as I review it, but it won't be part of the Court's analysis as the -- under intermediate scrutiny. That's not been fairly and timely presented by the State in my view. But you wanted to make other comments.

MR. KAISER: Your Honor, just that the two cases that the plaintiffs have been talking about for the last couple of times back and forth to the podium. Arlington Heights, right, is a 1977 case that's about Fourteenth Amendment equal protection challenges to housing discrimination. And to prevail in a housing discrimination

claim you have to prove intentional discrimination. And the Court looks -- was looking not to a legislative intentional discrimination but actions of the administrative body and municipal agents. And that sort of intentional discrimination is way easier to determine. You can figure out what a mayor did or a zoning board did much more than a legislator or a body of legislators.

And the case about -- the free exercise case about slaughtered animals is similarly distinguishable about legislative intent because there we're talking about the First Amendment equal protection challenge. The Supreme Court has used intentional discrimination there as well in a very different way than in a First Amendment speech case.

And if you look at it, the Court starts with the statute and parses the words of the statute to see, wait a minute, you used things like sacrifice to determine -- to define these animal cruelty regulations, and that raises the specter at least for us that these were done in violation of religious rights.

And, yes, the Court goes on and looks at other parts of the legislative history, but I don't think either of those cases stands for the proposition that a facially neutral speech -- a facially neutral statute charged under the speech clause, that you can ignore the facial neutrality and seek some sort of respite among the waters of legislative history.

THE COURT: Thank you.

MR. KAISER: Next topic?

The Court: I think that's as far as I hoped to go today. I think we've touched on everything. I was going to ask for closing comments, but I actually have learned over time that I benefit greatly from the thoughts of my very skilled and bright law clerks. So let's recess for a few minutes. I think we've probably heard what we need to hear. This is the time though for you to make argument. So either of you may have some closing remarks -- not right now but when we come back you may want to add something more.

I think we've covered what I want to cover. Let's -- it's almost 5:30. We've been going for about four hours with a short break in between. Let's take five minutes and come back in and wrap up whatever is left. Thank you.

(RECESS FROM 5:26 PM UNTIL 5:36 PM)

THE COURT: I'd like to tell you all that I thought of one more question, but in fairness it was my law clerk's question, but it's a good one and we had discussed it before and the State said something in argument today that implicates this potentially.

I don't know what the difference is exactly in the context of your motions, but I think this is an as applied challenge, but it really reads like a facial challenge, and all of your arguments really seem to be a facial challenge to

the statute and a response. That's how I'm construing it. Is that the wrong way to perceive it?

MR. LIEBMAN: I think it is a facial challenge. I conceive of as applied challenges when the statute is being enforced in a particular proceeding. So I would frame it as a facial challenge that would invalidate the statute altogether.

THE COURT: Now, there were the individualized questions relating to standing, but once there was standing, it seemed there was a facial challenge presented. That's how I viewed it. The State said earlier I think that there was a facial challenge.

You see it differently, Mr. Kaiser?

MR. KAISER: Well, Your Honor, I think the plaintiffs' pleadings were not clear on the issue, but to the extent that they make a facial challenge, I'm prepared to defend a facial challenge under the standard that there's no set of circumstances under which the law could be applied constitutionally. And to the extent that they are making an as applied challenge, I think we've got some facts that talk about their particular intended applications under the statute. They make it a facial challenge, I -- we'll stay with a facial challenge, Your Honor.

THE COURT: Well, what do you think you responded to in your papers, and what did you move on?

MR. KAISER: Well, we responded to their complaint,

which alleged a content or viewpoint discrimination in one count, and we responded to an overbreadth challenge, which that is a facial challenge, that's clear, in the other count. And then we responded to equal protection.

My understanding of their claim on a content-based or viewpoint-based discrimination challenge is that it's a facial challenge, but we included, to the extent that the plaintiffs were bringing an as applied challenge, we included facts particularized to the plaintiffs. I'm hoping I didn't make things more complicated than when you came out of the door.

THE COURT: No. I think I construed the portions of the State's brief presenting those facts as relating more to the standing challenge that the State reasserted, though some of it related to a discussion. I think you wove through the merits of the arguments.

It seemed to me that the quality and character of the briefing and the argument was about -- was a facial challenge to the statute, and that's how I construed it. That's how I intend to rule on it I think.

MR. KAISER: Yes, Your Honor.

THE COURT: Right, okay. What else did any of you want to tell me? This is your opportunity. It's the only opportunity you have to give us your positions. I think I do want to say -- I mean we'll hear anything that you want to tell us. I mean that. We'll stay as late as we need to stay.

I do want to tell you your briefing was excellent and your argument today has been extremely helpful. You have both been superb. You're obviously well prepared, and you've been focused and responsive to the Court's questions. Your papers were clear and organized. It was -- you've made our work so much easier than it sometimes is, especially with some complicated legal issues, and we're grateful for that.

What else do we need to know? Mr. Kaiser, anything more from the State?

MR. KAISER: Just a little bit, Your Honor. First, in the content neutrality intermediate scrutiny standard, we didn't talk about alternative channels of communication. I guess the plaintiffs probably don't dispute that there are substantial alternative channels of communication.

I think it's interesting in this case what that exactly means, because the plaintiffs are talking about recording as a -- as a speech right, so does there have to be alternative means of news gathering? If that's the case, they certainly win. There are lots of ways that the plaintiffs can get the information. They admit that. Does there have to be alternative means of communication, the actual dissemination of the information? Well, that's not even challenged under the statute.

So I think that, you know, to the extent that the Court gets to that element, I think it demonstrates that the statute

is in fact narrowly tailored because of the ample alternative methods for expression. And I know, you know, a couple of years ago I came -- we came before the Court and tried to argue that the alternative means of expression superseded a narrow tailoring analysis and lost twice. But I think there's still some relevance for that -- for that portion, and particularly recognizing that the narrowness in which the statute was written. It was written pretty broadly to begin with. And if there's some legislative history that's helpful, it's that the statute was narrowed repeatedly to address concerns about privacy and whistleblowing.

And the whistleblowing statute and whistleblowers, the State isn't interested in hiding criminal activity, and this statute is not interested in hiding criminal activity. The whistleblowing statutes and whistleblowers in general are encouraged to report criminal activity. But we're talking about specific types of folks who are entering private property and endangering the health and safety of -- or have the potential at least to endanger the health and safety of people on -- people and animals on animal agricultural operations.

THE COURT: On the alternative avenues for speaking, do you take issue with the case law that the plaintiffs cite in their papers about the multifactor test for example, that the Court should take into account the expense and

availability and suitability of the substitutes? I mean for example the State says you can fly a plane overhead, and the plaintiffs say, well, the cases tell you to look at the cost and how effective that would be. Judge, that's not a substitute here.

MR. KAISER: Well, you can fly a drone, which is a little different than flying a plane. But the --

THE COURT: Or take handwritten notes or the like and --

MR. KAISER: Right. And, no, the plaintiffs are not entitled to their preferred method of communication, and certainly they're not entitled to their preferred method of news gathering.

THE COURT: In light of subsection (b) of the statute, is there an alternative avenue for speech? The plaintiffs and any representatives from their organization cannot go to the facility even to take notes about what they saw so they can write an exposé about it. They can't do anything to enter the facility lest they run afoul of subsection (b). So what avenues -- you talk about encourage whistleblowers. That's one thing I suppose, though their experts talk about that.

MR. KAISER: Well, Your Honor, I take issue with your first premise. I think there are oftentimes agricultural operations that are open, that bring their doors open,

including some of the most contentious agricultural operations, like Hudson Valley Foie Gras, which has an essentially open door policy.

So I don't think that these plaintiffs are completely foreclosed. And certainly on a facial challenge reporters -- I mean maybe competitors are foreclosed, but reporters, people interested in the operations of the farm, they're not necessarily foreclosed.

What can these plaintiffs do assuming that a reasonable farmer would never allow a PETA or an ALDF representative on their farm? They can do FOIA requests. They can take surveillance outside. They can -- which is what plaintiff Meyer did. They can encourage whistleblowers. They've done that. They can get information from the inside. They've done that. They can use statistics. They've done that. So there are certainly ample alternatives that are available to them.

THE COURT: I guess my question was you don't take issue with the case law that the plaintiffs cited about the factors and considerations the Court should undertake in that review?

MR. KAISER: No, no, of course.

THE COURT: Okay.

MR. KAISER: And I also wanted to mention that the only time that I've seen the plaintiffs talk about the tester cases is referring to Desnick, which was not a First Amendment

case, right? This was the Seventh Circuit case about undercover investigations. And the plaintiffs sued for tort violations, and no First Amendment defense was raised.

And the Court, the Seventh Circuit there, said, well, in this particular circumstance, because there's no reasonable expectation of privacy under general privacy torts, there's -- there's no liability. And it was Judge Posner who wrote the opinion. And he said, but, you know, if I were to pretend to be a meter maid to go into your house, there would be liability under a tort privacy theory. And the Court analogized to the tester cases, which were not First Amendment cases, at least as much as I can recall and was able to look at very, very quickly.

THE COURT: It's a fair point. I was trying to think of the best analogies for illustrating some of the points. I don't have a specific tester case in mind that stood for the proposition that it was a First Amendment right that was at issue.

MR. KAISER: And there's a difference between going in and asking questions of a property owner to get an answer to see if there is racial discrimination versus concealing your identity to get access to a property. There's a difference there.

THE COURT: Well, I'm not sure that it would be helpful for us to get into -- to revisit that. But the

question in my mind was, is there a First Amendment right that exists, and do you surrender it at the door when you walk into private property, as the State was suggesting? I was just wondering, but go ahead.

MR. KAISER: And I would like to finish where we started, as you probably would imagine, that this Act prohibits conduct that's not -- that's not covered by the First Amendment. The Act protects 18,000 farmers, animal ag producers and other Utah citizens from unwanted invasions of their privacy and from dangerous intrusions. It does so while still allowing the plaintiffs to make all of the protestations that they want. They can do investigations. They can do investigations that are sanctioned by journalists -- by journalism organizations.

And in fact there's an amicus brief in the Ninth Circuit case, the Center for Medical Progress case, where 30 journalists agreed with what Dr. Sanders talked about, that undercover investigation isn't the beginning. It's the end of an investigation. The plaintiffs have all of those journalistic tools and investigative tools at their disposal.

The plaintiffs have all of the speech tools at their disposal to -- to suggest to Utahns to change their practices, to stop eating meat, end the practice of factory farming, whatever that is. This statute does not affect those rights.

And the rights that the plaintiffs seek, the right to lie

to gain access to private property, the right to some sort of heightened scrutiny because a couple of legislators have mentioned their names, doesn't exist in binding federal case law. At most we've got ALDF versus Otter.

And so the plaintiffs are asking for new federal constitutional rights that really, really infringe on the rights of Utah citizens and the right of the State to control private property. As we talked about a little bit, there could be pretty serious consequences. That means there's a First Amendment right to spy. That means there's a First Amendment right, at least a threshold right, to get access to a competitor or to a group that you disagree with so that you can try to undermine them. That means there's a federal constitutional right maybe to hack e-mails. I think the democratic party might disagree with that.

And so whether it's -- whether the target is a government agency, a conservative group, a liberal group or private property to seek that sort of constitutional protection is pretty serious.

And we didn't really talk about my favorite case, Western Watersheds, which illuminates those premises very, very well. And, you know, when I first read the case I thought, oh, this is really distinguishable because this is really, really conduct, right? This is trespassing onto private property, getting data and reporting it.

But there are two reasons I think that Western Watersheds is particularly important here. The first is that the plaintiffs made the same arguments regarding pre-speech conduct, that that pre-speech conduct -- and one of the plaintiffs in Western Watersheds is one of the plaintiffs here, PETA -- that pre-speech conduct is protected under the First Amendment. And the Supreme Court has time and time again said no, no, no.

The second reason that Western Watersheds is really important is because the Court construed the Act not just to be trespassing but actually to record, either handwritten or record an image, because that's what the plaintiffs were doing to get this information. So in that sense, even though the statute didn't mention recording, the Court construed it as requiring that.

And the Court held there is -- that the Supreme Court has never held that a trespasser, an uninvited guest, may exercise general rights of free speech on property privately owned. And --

THE COURT: That issue is not in dispute in this case I don't believe. It seems to me that the question that's presented by the parties is what is an uninvited trespasser? That's the question here.

MR. KAISER: There certainly is. I think subsection (b) allows --

The Court: The plaintiffs won't argue that one of their members can jump the fence in the middle of the night and run onto the property and place a device and not be subject to some constraint, I don't think. I don't think Mr. Liebman is going to stand up in a moment and tell me there is such a First Amendment right.

MR. KAISER: I think his -- I think his -- the natural conclusion of these arguments, the natural result of the constitutional rights he seeks gets there, even if the plaintiffs don't want to do it. But beyond that, someone who lies to get access to private property is much more like a trespasser and much less like an invited guest.

And I know in tort cases the courts have tried to draw a line about reasonable expectations of privacy, but I don't think that works in the First Amendment context. The First Amendment is about what sort of speech the government must allow and where it must allow it, not about the where -- the privacy expectations of citizens vis-a-vis the intrusion of the government or the intrusion of a third party.

So I think Western Watersheds is important for those two reasons. And even though it's -- there's this -- you might consider it dicta related to this case that someone is a trespasser, an uninvited guest, I think the statute here really incorporates those uninvited guests and unofficial trespassers, and that the First Amendment doesn't apply to

either of these two particularized new rights that the plaintiffs are seeking to provide.

For the reasons that we've talked about, the Act is not content or viewpoint-based. I would love to talk for four hours about the Equal Protection Clause because I think it is so so interesting. And I apologize to the Court that we spilled probably more ink than was necessary, but I think that the Court has identified that the animus doctrine is just not something that's appropriate to be applied in this case for sure following the guidance of the Powers case from the Tenth Circuit, and that the appropriate standard is a rational basis and the State has articulated rational bases to support the case under an equal protection challenge.

And with that I ask the Court grant our motion for summary judgment, deny the plaintiffs' motion for summary judgment and declare that the statute is constitutional.

The Court: Thank you, Mr. Kaiser.

MR. LIEBMAN: Let me start with the question of the ample alternative channels. I think it's certainly something that we've contested. And, you know, this idea that simply because there are other means of communicating your message ample alternative channels exist is simply not what the case law says. And again we return to McCullen, intermediate scrutiny case.

And in that case the Court makes clear, again at page

2535 through 2536, that Ms. McCullen, even after the amendments, was still able to approach and counsel, as she put it, women who were considering abortions, and she had persuaded about 80 women not to terminate their pregnancies since the 2007 amendment, nevertheless, she said she reaches fewer -- far fewer people, and that for the Court was relevant. So, you know, the mere fact that you can still do some of your speech I think is not responsive to the question of whether ample alternative channels are available.

And I think the Court in Rideout puts it quite succinctly where it reiterates the maximum -- maxim that a photograph is worth a thousand words. And certainly in this case photographs and videos of how animals are treated are not only quantitatively different but qualitatively different from the kinds of remaining information that we can seek. A FOIA document is not going to lead the federal government to hold hearings on the failures of the USDA in the same way that the Hallmark investigation did. And if you read the expert report of Mr. Thomas, it's quite gut wrenching, but it doesn't really stand in for the video itself.

And so looking at this kind of uniquely persuasive form of communication as, you know, ancillary to our protest activities, our ability to communicate with the public, I think is mistaken. This is a core form of speech that is persuasive in ways that other kinds of speech aren't. It

isn't just our preferred method, it's one that's qualitatively different. And of course the record bears that out. You don't get congressional hearings. You don't get a beef recall of 150 million pounds based on FOIA documents or based on a drone. This only happens through undercover investigations.

I think there's the discussion of, you know, the kinds of -- the Pandora's box that we would open up by recognizing that some First Amendment rights remain on private property is quite exaggerated. What we're talking about here is recording and speech on matters of significant public concern in -- on property that already has a reduced expectation of privacy. And we go into this in our brief about why commercial properties have a reduced expectation of privacy. That's a Supreme Court decision in New York versus Berger, and that's especially the case where they're heavily regulated.

And in fact under the Humane Methods of Slaughter Act, slaughter houses have to be open 24/7 to government regulators. You even have to do the regulators' laundry. So the idea that this is analogous to a home or a boardroom or all the other places that Mr. Kaiser discusses I think is not the case.

You know, there's a narrow holding here, which is that the First Amendment applies when we're talking about political speech on matters of significant public concern on property that already has a reduced expectation of privacy, and that's

the narrow framing of this issue.

I think when it comes to the Western Watersheds Project I want to respond. I think Mr. Kaiser's first instinct was right, that this case is really, really distinguishable as he put it. This is a case where someone to -- had to be a trespasser in the first place. And the only portion of the statute that has that similar standard is subsection (d).

And in Western Watersheds Project the Court doesn't even address the R.A.V. versus St. Paul case, which says that even where you're regulating speech that's otherwise not protected by the First Amendment, you can't do it in a content-based way. So to the extent that this statute is content-based, even subsection (d) would be unconstitutional for that reason.

And of course in that case the Court is looking at whether or not someone is a trespasser or an uninvited guest. And, again, the tort cases make clear that someone does not become a trespasser simply through the act of resume fraud or by virtue of conducting an uncover investigation.

I think it's also important to -- I think I'll just wrap up by noting that, you know, this statute is really slamming shut the only open window on how animals are treated on factory farms. And although there are other forms of gaining, you know, some idea of what happens, videos and photos are categorically different. And of course if there's a prohibition on gaining access by false pretenses, we can't

even take notes.

And so really the statute is leaving the consuming public in the dark about how billions of animals are treated, and that fails intermediate scrutiny at least, but it also fails intermediate scrutiny -- I'm sorry -- strict scrutiny. And as we discussed earlier, because at least the misrepresentations provision is content-based on its face, that statute, that subsection has to be subjected to strict scrutiny and fails on that basis.

And for those reasons we would ask Your Honor to grant the plaintiffs' motion for summary judgment, deny the defendants' motion and issue an injunction against enforcement of the Ag Gag statute.

THE COURT: All right, counsel. Thank you for your patience and all of your energy, your excellent argument. We'll take the matter under advisement and we'll provide a written ruling. We'll be in recess.

(HEARING CONCLUDED AT 6:01 PM)

* * *

Certificate of Reporter

I, Raymond P. Fenlon, Official Court Reporter for the United States District Court, District of Utah, do hereby certify that I reported in my official capacity, the proceedings had upon the hearing in the case of Animal Legal Defense Fund, et al. Vs. Gary R. Herbert, et al., case No. 2:13-CV-679, in said court, on the 25th day of October, 2016.

I further certify that the foregoing pages constitute the official transcript of said proceedings as taken from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name this 2nd day of November, 2016.

/s/ Raymond P. Fenlon